

Jurisdictional and Transfer Proposals for Complex Litigation

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I. Introduction

Aptly, the January 1991 session of the Section on Civil Procedure of the Association of American Law Schools, at which the papers in this symposium were first delivered, was entitled "Problems and Developments in Complex Litigation: You Can't Tell the Proposals Without a Program." Like the economy, law reform has its growth industries; over the last several years, pro-

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This Article is dedicated to Congressman Robert Kastenmeier, who served as Chair of the House Judiciary Subcommittee on Courts, Intellectual Property, and the Administration of Justice through the last Congress, and to the staff of the Subcommittee—especially Michael Remington, David Beier, and Charles Geyh. Many who worked on federal judicial improvements during the past several Congresses know that Chairman Kastenmeier and his staff created a climate especially hospitable to serious consideration of the merits of proposals for jurisdictional and procedural reform, free from partisanship or concern for political gain while sensitive to political realities. This was a Camelot for proceduralists, and the processes of justice are the better for it; don't let it be forgot. May it come again.

posals to deal with complex litigation have waxed numerous. This Article tries to explain the principal current proposals that would legislate changes in the jurisdiction or transfer powers of American federal and state courts to address perceived problems in the ways courts now process large, usually multiparty and multiforum litigation. The ambition of the Article is primarily expository; although I try to identify and explore key issues raised by the proposals, the number and scale of proposals on the scene are enough that it suffices for now to set out their main elements and distinctive features, lest the Article get as long as too many tenure pieces.

The proposals discussed here are: portions of the 1990 Report of the Federal Courts Study Committee dealing with complex litigation; the Complex Litigation Project of the American Law Institute (ALI); Congressman Robert Kastenmeier's H.R. 3406 in the 101st Congress, the proposed Multiparty, Multiforum Jurisdiction Act of 1990; the 1989 Report of the American Bar Association's Commission on Mass Torts to the ABA House of Delegates; and the draft Uniform Transfer of Litigation Act, which is under consideration by the National Conference of Commissioners on Uniform State Laws. The basic text of each proposal as it pertains to changes in jurisdiction or transfer authority appears in Appendices A-E to this Article; much explanatory material accompanying each proposal, however, is omitted, and several of the proposals remain subject to further revision.

These various proposals mostly redefine the courts' subject matter jurisdiction, or authority to transfer cases before them, as means to reduce or eliminate obstacles to consolidated treatment of related litigation scattered among different federal courts, between state and federal courts, or among courts of different states. Although the proponents of these reforms often consider more consolidation desirable, and making it easier would no doubt lead to more of it, clearing away obstacles to consolidation does not imply that using broadened authority would be desirable in every possible case.¹ Jurisdictional and transfer proposals to facilitate con-

1. For a skeptical view on consolidation in mass tort cases, see Transrud, *Joinder Alternatives in Mass Tort Litigation*, 70 CORNELL L. REV. 779 (1985). One of the recommendations of the Federal Courts Study Committee not discussed further in this Article was the development of guidelines for consolidation and severance, to try to foster appropriate use but also to avoid awkward efforts at combined treatment. See REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 45 (1990) [hereinafter FCSC REPORT].

solidation, then, can proceed from a relatively agnostic position about how worthy consolidated treatment is in various situations, and even skeptics of consolidation might be able to support some of these proposals. All the proposals, moreover, recognize that consolidated treatment may be desirable for only some parts of a complex litigation. They therefore include such provisions as retransfer or remand for individual damage determinations after combined liability rulings, or partial rather than complete initial transfer.

A main thrust of the several proposals is to eliminate obstacles to joint treatment that often exist for reasons more historical than functional, or at least do not result from judgments about how much our jurisdictional rules should help or hinder consolidation. Present arrangements often allow various forms of consolidation, or at least cooperation among different forums hearing related cases; the basic idea of such combined treatment, as opposed to many specifics of its implementation, is usually relatively uncontroversial when it is possible. It often goes unnoticed, though, how frequently consolidation lies beyond serious consideration (or may take heroic measures) because of barriers that exist for reasons having little or nothing to do with whether consolidation might be desirable.

A brief review of the main jurisdictional obstacles to consolidated treatment of scattered, related litigation illustrates the point that the present limits hardly reflect focused consideration of the desirable scope of possible consolidation. High on any list of jurisdictional obstacles must come the complete diversity requirement that for jurisdiction under section 1332,² all plaintiffs must be of diverse citizenship from all defendants.³ Whatever its virtues for controlling federal diversity dockets by excluding some primarily intrastate battles with only a small interstate element, this rule now irredeemably splits much multiparty state-law litigation between state and federal courts because parties who can satisfy

2. 28 U.S.C. § 1332 (1988).

3. See, e.g., E. CHEMERINSKY, *FEDERAL JURISDICTION* § 5.3.3, at 246-48 (1989) (history and discussion of complete diversity rule); *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806). Chief Justice John Marshall, author of the *Strawbridge* opinion, reportedly regretted the decision near the end of his time on the Supreme Court. See E. CHEMERINSKY, *supra*, at 247.

complete diversity (and sometimes removal) requirements choose federal court while others with related claims stay in state court.⁴

In addition, even for cases already within the federal court system, section 1407(a) transfer for consolidated or coordinated proceedings operates only during *pretrial* stages.⁵ Further, even if a class action might be desirable for handling a complex state-law matter, the Supreme Court's holding that usually all class members must *individually* satisfy the amount in controversy requirement⁶ prohibits the class action device in most diversity cases. And when parties file unremovable but related claims in different state courts, no authority now exists to transfer or consolidate such actions.

Before discussion of the proposals that address these various obstacles, it is useful to sketch the different levels on which consolidation measures could operate. One level comprises federal intrasystem transfer and consolidation, dealing with cases already in the federal judicial system but pending in different courts. The main step proposed on this level, as endorsed in the Report of the Federal Courts Study Committee⁷ and developed in detail in Ten-

4. For a fuller discussion of the complete diversity rule's effect in splitting related litigation, see Rowe & Sibley, *Beyond Diversity: Federal Multiparty, Multiforum Jurisdiction*, 135 U. PA. L. REV. 7, 19-20 (1986). Simple abolition of the complete diversity requirement within the context of existing general diversity jurisdiction, apart from being unfeasible because of the great increase in the diversity caseload it would likely cause, would not solve the problems that the requirement creates for consolidated treatment of complex litigation. It would both make eligible for federal jurisdiction large numbers of simple cases and leave unaddressed the problem of how to let courts consider consolidation when parties filed in both federal and state systems, as they could continue to do. *See id.* at 24-25.

5. 28 U.S.C. § 1407(a) (1988) provides, in pertinent part: "When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. . . ."

As a practical matter, for several reasons—such as disposition on pretrial motions, settlement, or consent to joint trial—the pretrial limitation in § 1407(a) often does not force unwanted separate trials. Still, the limit can have that effect and makes it impossible for the mechanism established by § 1407(d), the Judicial Panel on Multidistrict Litigation, to consider squarely the desirability of joint trials on common questions. For further discussion of the issues involved in and ways around the pretrial limitation of present § 1407(a), see Rowe & Sibley, *supra* note 4, at 13 & n.26; text accompanying note 38 *infra*.

6. *Zahn v. International Paper Co.*, 414 U.S. 291 (1973).

7. FCSC REPORT, *supra* note 1, at 45-46.

tative Draft 1 of the ALI Complex Litigation Project,⁸ involves the broadening of present section 1407 to authorize joint trial as well as consolidated pretrial proceedings.

The second level, on which the proposals are the most numerous, varied, and complex, is that of federal-state intersystem consolidation. These proposals seek to permit consolidation of at least some aspects of proceedings when related matters were filed in one or more federal courts *and* one or more state courts, or in scattered state courts. The most common response suggests removal of state cases to federal court and consolidation of all cases (some of which might have been filed originally in federal court) before a single transferee federal court, as under present or broadened section 1407. However, if the bulk of claims in a complex matter governed by state law were filed in state courts, especially the courts of a single state, transfer of federal actions to that state's courts might be preferable. Proposals on this level have come from the Federal Courts Study Committee,⁹ then-Congressman Robert Kastenmeier's House Judiciary Committee on Courts, Intellectual Property, and the Administration of Justice;¹⁰ Tentative Draft 2 of the ALI's Complex Litigation Project;¹¹ and the ABA Commission on Mass Torts.¹²

The third level, which has received the least attention, contemplates interstate transfer, including possible transfer and consolidation of related matters between courts of different states without necessarily involving the federal judiciary. The ALI Complex Litigation Project has planned a third stage to "examine ways of facilitating the coordination, and possibly the consolidation, of

8. AMERICAN LAW INSTITUTE, COMPLEX LITIGATION PROJECT 27-242 (Tent. Draft No. 1, 1989) [hereinafter ALI TENTATIVE DRAFT 1]. See also AMERICAN LAW INSTITUTE, COMPLEX LITIGATION PROJECT 1-26 (Tent. Draft No. 2, 1990) [hereinafter ALI TENTATIVE DRAFT 2] (revised version of proposed complex litigation statute for federal intrasystem consolidation), 151-52 (revised black letter of § 3.01 on consolidation standard).

9. FCSC REPORT, *supra* note 1, at 44-45.

10. H.R. 3406, 101st Cong., 2d Sess. (1990). H.R. 3406 passed the House of Representatives, see 136 CONG. REC. H3116-19 (daily ed. June 5, 1990), but did not come up for a vote in the Senate. An earlier version in the previous Congress, title III, subtitle A of H.R. 4807, 100th Cong., 2d Sess. (1988), met a similar fate. See H.R. REP. NO. 515, 101st Cong., 2d Sess. 5 (1990).

11. ALI TENTATIVE DRAFT 2, *supra* note 8, at 27-150.

12. ABA Comm'n on Mass Torts, Report to the House of Delegates (November, 1989) [hereinafter ABA Commission Report].

cases that are dispersed among the courts of several states,"¹³ but has not yet published a proposal. The National Conference of Commissioners on Uniform State Laws, however, has in advanced stages of consideration a draft Uniform Transfer of Litigation Act,¹⁴ which may receive approval as a proposed Uniform Act this summer.

II. Federal Intrasystem Consolidation

Of the types of proposals considered here, the shortest step conceptually from our existing system is the broadening of section 1407¹⁵ to permit transfer for coordinated or consolidated trial as well as pretrial proceedings. Such a measure might be drafted very simply, amending existing section 1407(a) to authorize transferee courts to retain transferred actions for trial, perhaps with a presumption in favor of remand back to the transferor federal district courts for individual damage determinations after consolidated liability proceedings.¹⁶ Allowing joint trials, however, heightens the significance of some issues and can demand more detailed treatment. The decision of the Judicial Panel on Multidistrict Litigation to transfer would assume even greater consequence than it now has, which raises the question whether transfer should be possible in the interests of systemic efficiency even if all parties oppose it, and may require some possibility of review. Similarly, after a joint trial on liability, remands for damage determinations without appellate review of the liability judgment could be wasteful. Joint trials, with their higher incidence of rulings of law on the substantive merits, also make choice of law issues far more pressing.

The Federal Courts Study Committee, in its report briefly discussing recommendations in many fields, omitted such ancillary issues and limited itself to a general endorsement of broadening

13. ALI TENTATIVE DRAFT 1, *supra* note 8, at 7.

14. National Conference of Commissioners on Uniform State Laws, Uniform Transfer of Litigation Act (May 1991 draft) [hereinafter Draft Uniform Transfer Act].

15. 28 U.S.C. § 1407 (1988).

16. Congressman Kastenmeier introduced such a bill in 1983; in addition to the trial authority it would have dealt briefly with choice of law and trial subpoena power. H.R. 4159, 98th Cong., 1st Sess. (1983).

section 1407 to permit consolidated trials.¹⁷ Tentative Draft 1 of the ALI's Complex Litigation Project, however, comprehensively discussed the range of issues involved in such a broadening and won preliminary approval in principle of most of its proposals at the ALI Annual Meeting in 1989.¹⁸ In brief, Tentative Draft 1 provides detailed criteria to guide the Panel's transfer decisions;¹⁹ proposes expansion of the present Judicial Panel on Multidistrict Litigation, reconstituted as the Complex Litigation Panel and made an Article III tribunal, from seven to nine judges authorized to sit as a body or in subpanels of three;²⁰ outlines several aspects of Panel procedure;²¹ and addresses the powers and duties of the transferee court.²²

On the delicate issues of review of Panel and transferee court rulings, Tentative Draft 1 makes several different recommendations in the effort to balance the dangers of error against those of piecemeal or costly and time-consuming review. In section 3.07, it originally set all transfer or consolidation decisions of the full Panel or a subpanel beyond review by any court.²³ A later draft statute in Tentative Draft 2, however, authorizes petitions for full Panel review of a subpanel grant of transfer²⁴ and review by extraordinary writ of actions other than denials of transfer, which are unreviewable.²⁵ Tentative Draft 1 further provides for discretionary Panel review of transferee court decisions on retransfer of subsequent stages of proceedings;²⁶ designates the court of appeals for the circuit in which the initial transferee district court is located as the reviewing court for all other appeals;²⁷ and authorizes peti-

17. See FCSC REPORT, *supra* note 1, at 44-45.

18. See AMERICAN LAW INSTITUTE, 66th Annual Meeting Proceedings 398 (1989).

19. See ALI TENTATIVE DRAFT 1, *supra* note 8, § 3.01, reprinted with revisions in ALI TENTATIVE DRAFT 2, *supra* note 8, at 151-52. See also ALI TENTATIVE DRAFT 1, *supra*, §§ 3.03 (standards for timing of actions on transfer and consolidation decisions), 3.04 (standards for determining where to transfer consolidated actions).

20. See ALI TENTATIVE DRAFT 1, *supra* note 8, § 3.02 comments c-d (reconstitution, functioning, and composition of Panel); ALI TENTATIVE DRAFT 2, *supra* note 8 at 12-13 (proposed amendment to 28 U.S.C. § 451 (1988), making Complex Litigation Panel a "court of the United States").

21. See *id.* § 3.05.

22. See *id.* § 3.06.

23. See *id.* § 3.07(a).

24. See ALI TENTATIVE DRAFT 2, *supra* note 8, at 1-2 (proposed 28 U.S.C. § 1407(a)).

25. See *id.* at 11-12 (proposed 28 U.S.C. § 1407(g)).

26. See ALI TENTATIVE DRAFT 1, *supra* note 8, § 3.07(b).

27. See *id.* § 3.07(d).

tions for review of liability rulings, which that court of appeals could grant in its discretion.²⁸ The expansion of transferee court proceedings to include joint trials requires such review of liability determinations to guard against the possibility of multiple damage trials that either become unneeded because of a reversal on liability or need to be repeated because of a change in standards following review. This need is one of the strongest justifications for the detailed treatment of subsidiary matters in what might otherwise appear a simple job calling only for an amendment to expand section 1407 authority to consolidate trial as well as pretrial proceedings.

The remaining principal aspects of Tentative Draft 1 deal with further needed incidents of expanded transfer authority and foreshadow problems that the Complex Litigation Project is still addressing. Section 3.08 would confer personal jurisdiction on the transferee court to the full extent permitted to a federal court by the Constitution and thus avoid problems with limits on state courts' long-arm powers that do not confine federal courts.²⁹

28. See *id.* § 3.07(c). After a final transferee court determination of liability as to all claims and parties, the appellate court could grant review "if it determines that doing so is likely (i) to avoid harm to the party seeking review and (ii) to promote the efficient and economical resolution of the litigation." *Id.* This proposal would eliminate as unnecessary for these cases the present requirement of trial judge certification for interlocutory review in 28 U.S.C. § 1292(b) (1988), but it further provides for certification of final determinations of liability as to less than all claims or parties if the transferee court "concludes that there is no just reason for delay." Cf. FED. R. CIV. P. 54(b) (in cases involving multiple claims or parties, authorizing final judgment so as to allow immediate appeal on less than all claims or parties "only upon an express determination that there is no just reason for delay").

29. See ALI TENTATIVE DRAFT 1, *supra* note 8 § 3.08. For further discussion of the scope of federal courts' personal jurisdiction authority in multiparty, multiform litigation, see, e.g., Rowe & Sibley, *supra* note 4, at 22-23 n.78, and sources there cited. Professor Richard Epstein has recently added his voice to those taking what appears to be a minority view, that the Fifth Amendment due process clause places substantial limits on the federal courts' constitutional authority to exercise personal jurisdiction beyond the requirement of minimum contacts with the United States. See Epstein, *The Consolidation of Complex Litigation: A Critical Evaluation of the ALI Proposal*, 10 J. LAW & COMM 1, 52-53 (1990). His discussion seems to overlook the distinction between constitutional and statutory or decisional limits on federal courts' authority, and mistakenly presumes that in any jurisdiction based on Article III diversity authority the "federal courts are functioning (as it were) as state courts." *Id.* at 52. That is far from entirely the case, even if federal courts choose and apply state law, when a special diversity-based jurisdiction exists for a role to which the federal forum is uniquely suited, as is true with statutory interpleader and would be true of a federal multiparty, multiform jurisdiction. See Rowe & Sibley, *supra* note 4, at 38.

Section 3.09 raises perhaps the most difficult issue of all: choice of governing law. It also foreshadows an approach in the form of a federal statute providing choice of law rules, but leaves its details for later development. The problem is not whether federal courts exercising special complex-litigation consolidation authority should be freed from present decisional law, which requires federal courts in state law cases to follow the conflicts rules of the state in which they sit.³⁰ Agreement is widespread that they must be.³¹ The threshold issues are whether the federal courts should be authorized to develop a federal common law of choice of law for such cases, or if the statute should go further and specify principles of choice of law for the federal courts to follow — and if so, which of the conflicting approaches in this much-contested area should govern. A specter lurking in the background is the possibility that choice of law problems could be so daunting, and agreement on approaches so elusive, as to prevent major expansions in consolidation authority. The Reporters for the Complex Litigation Project have promised to offer statutory principles for the Institute's consideration;³² work on these continues.³³

30. See *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941) (federal courts must follow conflicts rules of forum state in diversity cases); *Griffin v. McCoach*, 313 U.S. 498 (1941) (companion case extending *Klaxon* rule to statutory interpleader cases); *Day & Zimmermann, Inc. v. Challoner*, 423 U.S. 3 (1975) (per curiam) (summarily reaffirming *Klaxon* in extreme case in which forum state's conflicts law appeared to require application of Cambodian substantive law).

31. For a discussion of the reasons why federal courts' law choice in such cases should be guided by federal rather than state-law conflicts rules, see, e.g., Rowe & Sibley, *supra* note 4, at 37-39.

32. See ALI TENTATIVE DRAFT 2, *supra* note 8, commentary to proposed 28 U.S.C. § 1407A(c), at 18-19 ("Chapter 6 of this project will include specific statutory choice of law proposals . . .").

33. See AMERICAN LAW INSTITUTE, COMPLEX LITIGATION PROJECT (Reporters' Preliminary Memorandum on Chapter 6, 1990).

In an earlier article, Kenneth Sibley and I argued in favor of authorizing a federal common law of choice of law, largely out of concern for possible rigidity and unfortunate results if federal choice of law principles were codified. See Rowe & Sibley, *supra* note 4, at 39-40. Since then, while I have been serving as an adviser to the Complex Litigation Project, the Reporters have convinced me that the reasons for attempting codification are persuasive—which leaves for the future whether any particular codification can gain wide enough acceptance. See generally Kane, *Drafting Choice of Law Rules for Complex Litigation: Some Preliminary Thoughts*, 10 REV. LITIG. 309 (1991).

For a recent, vigorous attack on the Reporters' approach and unpublished preliminary efforts at developing it, see Epstein, *supra* note 29, at 23-29. Ignoring standard disclaimers on a preliminary draft, Epstein repeatedly refers to the "ALI proposal." The merits of the disagreement are beyond the scope of this Article; for a general discussion of these issues by the Associate Reporter for the Project, see Kane, *supra*. The

Finally, a future section 3.10 will address how the federal courts and the Panel should deal with cases in which the parties all oppose use of the complex-litigation mechanisms.³⁴ The Project contemplates that the courts could initiate and compel consolidation in some circumstances despite the objection of both or all parties.³⁵ This authority seems warranted, given that the courts could in any event override objections of many parties to order transfer and consolidation when just one moved to seek it. Still, the unanimous wish of all parties to maintain a separate action where they have already begun litigating might stem from reasons that the courts should respect, short of giving some or all parties a veto.³⁶

The ALI's draft proposals to expand section 1407 illustrate the necessary complexity and many secondary issues in even a

vehemence of the attack, when the Reporters have not yet brought forth a proposal for debate, is puzzling. But then I do not claim to know much about conflicts, a field that appears to live up to its name.

34. See ALI TENTATIVE DRAFT 1, *supra* note 8, at 221.

35. See ALI TENTATIVE DRAFT 2, *supra* note 8, draft 28 U.S.C. § 1407(e) (authorizing initiation of transfer proceedings by Panel, by any federal court in which an action is pending, or on motion of any party).

36. See Rowe & Sibley, *supra* note 4, at 36 & n.119. For contrasting views on the desirability of mandatory joinder and consolidation, see Epstein, *supra* note 29; Freer, *Avoiding Duplicative Litigation: Rethinking Plaintiff Autonomy and the Court's Role in Defining the Litigative Unit*, 50 U. PITT. L. REV. 809 (1989); and Note, *Mandatory Joinder of Parties: The Wave of the Future?*, 43 RUTGERS L. REV. 53 (1990). Freer emphasizes the public-resource nature of courts and sees plaintiffs' "selfish strategic desire to sue separately" as causing unjustified duplication of effort, cost, and delay. See Freer, *supra*, at 832-33. The Rutgers Note cautiously endorses some broadening of mandatory joinder of all potential defendants, in line with an emerging "truth-determining" ideology as opposed to a more traditional adversarial view, while urging empirical data collection and analysis about costs and benefits. See Note, *supra*, at 59-64, 90.

Epstein views claims as individual property rights and favors voluntary over compulsory consolidation, see Epstein, *supra*, at 32-33, which appears to regard consolidation in terms that are too binary. Unless all parties agree in a particular case on some existing or future form of consolidation, which will often not happen as adversarial lawyers assume that anything that the other side wants must be bad for their own clients, an element of compulsion is present when one party (such as a defendant seeking transfer and consolidation under § 1407) seeks and gets consolidation opposed by others. Judicial compulsion against the will of all parties seems different more in degree than in kind, and in any event takes place already under Federal Rule of Civil Procedure 42 with its authority for judges to order joint hearings and trials of "actions involving a common question of fact or law" pending before them, or to "order all the actions consolidated."

relatively modest step for improving our courts' ability to deal with complex litigation. Some may wonder whether the game is worth the candle—especially for the relatively small improvement that this particular proposal would yield. After all, many actions transferred and consolidated under existing section 1407 never get to separate trials on common issues because of pretrial disposition, joint trials by consent, or transfer of cases for joint trial under section 1404(a)³⁷ instead of section 1407. These alternatives, however, leave to happenstance what could be addressed coherently, sometimes permit separate arguments over the different section 1407 and section 1404(a) transfer decisions, and have the Panel deciding on pretrial transfer and consolidation with no formal voice over trial consolidation.³⁸ On balance, if the Reporters can pull the choice of law rabbit out of the hat, the proposed changes seem worth it—by themselves or in combination with a broader reform to deal with federal-state intersystem consolidation, the proposals to which I now turn.

III. Federal-State Intersystem Consolidation

This second level has much of the action with the number, complexity, and variation in proposals at their highest. All the proposals here would either expand existing federal jurisdiction or create a new federal subject matter jurisdiction, but the basis for this expanded or new jurisdiction distinguishes the approaches. The Federal Courts Study Committee and H.R. 3406 would rest on minimal diversity, using Congress' Article III authority to confer subject matter jurisdiction on the federal courts whenever *any* plaintiff is of diverse citizenship from *any* defendant. For this special jurisdiction, then, the two proposals using minimal diversity would abandon the complete diversity requirement with its tendency to split related cases between state and federal courts. Precedent for the use of this minimal diversity authority is federal

37. 28 U.S.C. § 1404(a) (1988) provides: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

38. See ALI TENTATIVE DRAFT 1, *supra* note 8, § 3.02, comment b (discussing limitations of other approaches).

statutory interpleader, which is available when any two adverse claimants are of diverse citizenship.³⁹

The ALI's Tentative Draft 2, choosing an approach based solely on removal rather than original filing, requires no new original jurisdiction. Instead, it relies on statutory authorization for ancillary jurisdiction over transactionally related state court cases removed to join an existing federal action, without regard to the basis for original federal jurisdiction. The ABA Commission on Mass Torts would use a novel—and some might say too clever—but constitutional approach to federal question jurisdiction: federalizing the choice of state law to recharacterize any case involving such a choice as “arising under the Constitution and laws.”

39. 28 U.S.C. § 1335 (1988). The Supreme Court upheld the constitutionality of statutory interpleader jurisdiction based on minimal diversity in *State Farm Fire & Casualty Co. v. Tashire*, 386 U.S. 523, 530-31 (1967), and confirmed that it “is settled that complete diversity is not a constitutional requirement” in *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 373 n.13 (1978).

In a recent article, Professor Linda Mullenix has questioned the use of the Article III minimal diversity authority for complex litigation reform. Among other criticisms, she implies that those who favor abolition of the general diversity jurisdiction have failed to “explain why complex cases deserve a federal preference.” Mullenix, *Complex Litigation Reform and Article III Jurisdiction*, 59 *FORDHAM L. REV.* 169, 196 (1990). Well, we may not have persuaded her, but we have tried. See e.g., Rowe & Sibley, *supra* note 4, at 8-9, 17-19 (discussing impact of constitutional limits on state courts’ territorial jurisdiction on ability to consolidate scattered, related litigation in state systems).

Mullenix also states that “the reformers’ proposals are at odds with repeated calls for the abolition of diversity jurisdiction.” Mullenix, *supra*, at 220 (footnote omitted). Yet saying that one specialized form of minimal diversity jurisdiction to serve a specific purpose for which the federal courts are especially well suited is a good idea leaves one free to make distinct judgments about whether the general diversity jurisdiction—which these proposals would not broaden—should be retained, narrowed, or abolished. Supporting a minimal diversity-based complex litigation jurisdiction is no more inconsistent with favoring abolition of general diversity jurisdiction than is defending the retention of statutory interpleader and alienage jurisdiction. See, e.g., Rowe, *Abolishing Diversity Jurisdiction: Positive Side Effects and Potential for Further Reforms*, 92 *HARV. L. REV.* 963, 964 n.5 (1979).

Mullenix further argues that those who would “abolish diversity jurisdiction for simple diversity cases but . . . maintain it for the class of complex cases” must offer a “basis for distinguishing individual diversity cases from aggregative diversity cases . . . that is related to the underlying rationale for diversity jurisdiction.” Mullenix, *supra*, at 220. To the contrary, the justifications for federal complex litigation jurisdiction are independent of the concern for state court bias that is commonly taken to be a major reason for the Article III diversity authority and the statutory general diversity jurisdiction. For whatever reason it got into Article III, the diversity authority is there and Congress may use it for any reason. Federal complex litigation jurisdiction, moreover, could further national commerce—an end sometimes also mentioned as one that diversity jurisdiction serves—by providing improved dispute handling in complex cases, which the general diversity jurisdiction often does poorly and sometimes impedes. See *supra* text accompanying note 4.

Of the proposals based on minimal diversity, the Federal Courts Study Committee endorsed in principle the idea of "a special federal diversity jurisdiction . . . to make possible the consolidation of major multi-party, multi-forum litigation" in which "parties can be included even if they are citizens of the same state."⁴⁰ The Committee expressly disclaimed any effort to deal with "the numerous difficult subsidiary issues in complex litigation" and referred to the Kastenmeier, ALI, and ABA proposals.⁴¹ In beginning to consider these, I should emphasize two further major grounds of distinction in coverage or operation, in addition to the minimal diversity, ancillary, or federal question basis: whether the jurisdiction would cover only single-accident litigation or should encompass mass-exposure torts as well, and whether the jurisdiction could be invoked by either original filing or removal or only by removal of cases already filed in state court. These and other significant features distinguish the three remaining proposals discussed in this section from each other.

A. *H.R. 3406*

Among these proposals, the one that has come the closest to enactment into law is the Multiparty, Multiforum Jurisdiction Act, which in somewhat different forms passed the House of Representatives in 1988 as a subtitle of H.R. 4807 and in 1990 as H.R. 3406.⁴² This bill would have created a new federal subject matter jurisdiction, based on the constitutional minimal diversity authority but with further requirements to make it available only for large single-accident litigation with a multistate element. Consequently, this jurisdiction would not have been available for multiple-exposure product liability cases such as drug or asbestos litigation, a limit both justifiable as confining the measure to an experimental first step in a novel area and understandable as the product of political bargaining over the content of the bill.⁴³

40. FCSC REPORT, *supra* note 1, at 44, 45.

41. *Id.* at 45.

42. See *supra* note 10. H.R. 3406 with minor changes has been introduced in the House of Representatives in the current session of Congress. H.R. 2450, 102d Cong., 1st Sess. (1991).

43. On the forces that influenced this and other aspects of H.R. 3406, see Geyh, *Complex Litigation and the Legislative Process*, 10 REV. LITIG. 401 (1991).

The framing of the jurisdiction proposed by H.R. 3406 is best conveyed by its core language:

The district courts shall have original jurisdiction of any civil action involving minimal diversity between adverse parties that arises from a single accident, where at least 25 natural persons have either died or incurred injury in the accident at a discrete location and, in the case of injury, the injury has resulted in damages which exceed \$50,000 per person, exclusive of interest and costs⁴⁴

The original character of the jurisdiction establishes that parties (even fewer than the 25 required for the jurisdiction to exist) could invoke it in the original filing by making the necessary allegations about the accident and injuries. A key additional provision would allow intervention by parties with claims arising out of the same accident, even if they could not have brought an original action in federal court.⁴⁵ Thus for cases already within the special jurisdiction, the legislation would eliminate further issues of aggregation⁴⁶ or ancillary jurisdiction in connection with jurisdictional amount requirements, and for class actions, the legislation would overrule *Zahn v. International Paper Co.*⁴⁷ This provision would allow nondiverse plaintiffs or those with below-minimum claims to take advantage of the jurisdiction in class or nonclass form, serving its purpose by enabling the consolidation of *all* related claims.

Original filing by plaintiffs offers one of two principal methods for parties to initiate use of the jurisdiction. The other method is removal by defendants sued in state court, so long as an action could have been brought within the jurisdiction in federal court, regardless of where the action was actually filed.⁴⁸ Thus state-court defendants could either initiate or join a multiparty, multiforum federal action by removal, and as with plaintiffs, the action removed by a defendant need not be one that would have

44. H.R. 3406, 101st Cong., 2d Sess. § 2(a) (1990) (proposed 28 U.S.C. § 1367(a)). Further subsections elaborated on several of the terms and added conditions requiring some geographical scattering of defendants or parts of the accident, without which the need for such a jurisdiction could rarely arise.

45. *Id.* (proposed 28 U.S.C. § 1367(c)).

46. See E. CHEMERINSKY, *supra* note 3, § 5.3.4, at 258-59.

47. See *supra* text accompanying note 6.

48. H.R. 3406, 101st Cong., 2d Sess. § 5(2) (1990) (proposed 28 U.S.C. § 1441(e)(1)).

been within original federal jurisdiction so long as the overall jurisdictional requirements were met.⁴⁹

H.R. 3406 took an intermediate position on issues of party initiative and court control. Unlike the ALI proposals, the bill would have required the initiative of some party to invoke jurisdiction and would not have allowed for court initiative.⁵⁰ Yet upon its invocation by any qualifying party, just as with other original federal jurisdictions, this jurisdiction would have attached as a matter of right despite the opposition of other parties. Judicial control over parties' use of this jurisdiction would involve several mechanisms: notice to the Judicial Panel on Multidistrict Litigation of the pendency of an action within the jurisdiction,⁵¹ which would facilitate transfer of related cases in, or removed to, federal courts; discretionary transferee court authority to retain transferred actions for trial;⁵² and a novel "reverse removal" authority to remand cases removed from state courts for determinations of damages after federal court rulings on liability.⁵³

49. *See id.*

50. Compare *id.* §§ 2(a) (proposed 28 U.S.C. § 1367(a) providing for original jurisdiction), and 5(2) (proposed 28 U.S.C. § 1441(e)(1) providing for removal by state court defendants), with text accompanying notes 32-34 *supra* (discussion of ALI TENTATIVE DRAFT 1) and ALI TENTATIVE DRAFT 2, *supra* note 8, § 5.01(b) (providing for veto on Panel removal of particular action from state court, but only when all parties to the case as well as the appropriate state judge object).

51. H.R. 3406, 101st Cong., 2d Sess. § 2(a) (1990) (proposed 28 U.S.C. § 1367(d)).

52. *Id.* § 4 (proposed 28 U.S.C. § 1407(i)(1)). This subsection would have granted general discretionary authority for transferee courts to retain transferred actions for determinations of liability and punitive damages. It would have created a preference for return to federal transferor courts or state removal courts for other than punitive damage determinations, unless the transferee court decided that keeping the case for damage rulings as well would be "for the convenience of parties and witnesses and in the interest of justice." *Id.* Such a case might arise if, for example, numerous parties had independent claims that would likely exhaust a limited fund available to pay damages.

53. *Id.* § 5(2) (proposed 28 U.S.C. § 1441(e)(2)). Professor Mullenix suggests that the authority for federal courts exercising federal complex litigation jurisdiction to remand removed cases to state courts for damage determinations relies on "abstention analogies of dubious constitutional validity," Mullenix, *supra* note 39, at 173, and that the "advocates for reverse-removal proposals have . . . ingenuously found doctrinal support . . . in abstention theory," *id.* at 215. She cites only a student note that was primarily about consolidation of multistate litigation in state courts, *see id.* at 216 n.38. She also argues that "remanding diversity-based cases to state forums contravenes the principle [sic] purpose of federal diversity jurisdiction, which is to protect against potential state bias." *Id.* at 221. The justifications for such remands need be nothing so fancy as abstention analogies. The aims can include the practical ones of not keeping parties needlessly in consolidation courts distant from where they filed when their cases move from common to individual issues, and not burdening transferee courts with masses of individual deter-

Agreeing with the ALI Complex Litigation Project that consolidated rulings on liability call for some possibility of review before individual proceedings on damages,⁵⁴ the drafters of H.R. 3406 included provision for review in the court of appeals with jurisdiction over the transferee district court. The trial court's decision to remand for damage determinations would trigger a sixty-day period for appeal with the remand suspended until final disposition of the appeal.⁵⁵ In contrast with the discretion the ALI would confer on the courts of appeals,⁵⁶ interlocutory appeal of the liability determination under H.R. 3406 would be a matter of right.

The final major issue faced in H.R. 3406 was choice of law. Understandably, for a bill aiming to take only a tentative first step before the ALI completes its draft choice of law provision,⁵⁷ the framers chose the simpler approach of authorizing federal courts to create common law. The bill provided, however, a detailed, nonexhaustive list of ten "factors that the court may consider in choosing the applicable law,"⁵⁸ such as where claims had been or might have been brought, the location of the accident and related transactions, the parties' residence or place of business, the desirability of applying uniform law, and interests of jurisdictions in having their law apply.⁵⁹ Controversially, H.R. 3406 went on to give a strong but not absolutely binding direction to favor the application of the law of a single jurisdiction.⁶⁰ The narrow focus of the proposal on single-accident mass disasters makes this preference less problematic than it would be in a multijurisdiction,

minations when the main reason for consolidation is the economical treatment of *common* issues. As for state court bias, the purpose of federal complex litigation jurisdiction would be facilitating treatment of scattered, related litigation, not providing an escape from feared local prejudice. Remands would be fully consistent with the purposes of the jurisdiction, and concern for possible bias hardly seems sufficient to saddle the federal courts with damage determinations after they have done their job with common questions.

54. See *supra* text accompanying note 28.

55. See H.R. 3406, 101st Cong., 2d Sess. §§ 4 (proposed 28 U.S.C. § 1407(i)(2)), 5(2) (proposed 28 U.S.C. § 1441(e)(3)). The bill also provided for appeals of punitive damages determinations, see *id.* § 4 (proposed 28 U.S.C. § 1407(i)(3)), and made decisions concerning remand for determination of damages unreviewable, see *id.* §§ 4 (proposed 28 U.S.C. § 1407(i)(4)), 5(2) (proposed 28 U.S.C. § 1441(e)(4)).

56. See *supra* text accompanying notes 27-28.

57. See *supra* notes 32-33 and accompanying text.

58. See H.R. 3406, 101st Cong., 2d Sess. § 6(a) (proposed 28 U.S.C. § 1658(a)).

59. *Id.*

60. See *id.* § 6(a) (proposed 28 U.S.C. § 1658(b)).

multiple-exposure case; but it still raises problems of fairness and federalism, especially if parties had originally filed properly in a federal or state court that would have applied different law.⁶¹

B. ALI Tentative Draft No. 2

Part of the most ambitious complex litigation effort now under way, Tentative Draft 2 of the ALI's Complex Litigation Project proposes a more far-reaching reform to address federal-state inter-system consolidation. In brief, it would cover both single-accident and mass-exposure torts, and could apply to nontort litigation as well. The ALI proposal would be invoked mainly by removal from state court on request of a party or state court judge to the Complex Litigation Panel for consolidation with an existing, related federal action, without regard to the basis for jurisdiction over that action. It would dovetail with the federal intrasystem transfer and consolidation proposal of Tentative Draft 1, both giving the Panel control over removal, transfer, and consolidation rulings and guiding the Panel's decisions with the same basic criteria from Tentative Draft 1.⁶² Tentative Draft 2 also proposes an ingenious and carefully crafted mechanism for court-ordered notices of intervention and preclusion, in some circumstances permitting nonparties who are sent notice and choose not to intervene to benefit from *and be bound by* issue determinations in the consolidated proceeding.

61. For a highly critical view of this conflict provision, see Sedler & Twerski, *The Case Against All Encompassing Federal Mass Tort Legislation: Sacrifice Without Gain*, 73 MARQ. L. REV. 76 (1989). For the response of the sponsor of H.R. 3406 and a member of the House Judiciary Courts Subcommittee staff, see Kastenmeier & Geyh, *The Case in Support of Legislation Facilitating the Consolidation of Mass Accident Litigation: A View from the Legislature*, 73 MARQ. L. REV. 535 (1990). For background on the preference for a single governing law, see Geyh, *supra* note 43, at 402-03.

Beyond the major aspects discussed in the text, further provisions of H.R. 3406 dealt with venue, service of process, and subpoenas. See H.R. 3406, 101st Cong., 2d Sess. §§ 3 (proposed 28 U.S.C. § 1391(g) (venue)), 7(a) (proposed 28 U.S.C. § 1697 (service of process)), 7(b) (proposed 28 U.S.C. § 1785 (subpoenas)).

62. Because the federal intrasystem and federal-state intersystem are designed to work together, Tentative Draft 2 needs no separate provisions for many ancillary matters such as appeal of Panel transfer decisions. The two levels would, in effect, share many aspects of their procedure in common, beyond the fundamental transfer and consolidation standard criteria themselves. On these procedures, see *supra* notes 19-33 and accompanying text.

As with H.R. 3406, the basic language from Tentative Draft 2 best conveys how the proposed structure would work:

Except as otherwise provided by Act of Congress, upon notice by one or more parties to a state action, or the certification of any state judge presiding over the action, one or more civil actions pending in one or more state courts may be removed to federal court and consolidated by the Complex Litigation Panel . . . if the removed action arises from the same transaction, occurrence, or series of transactions or occurrences as an action already filed in federal court, and shares a common question of law or fact with that action.⁶³

To ground the exercise of this removal authority, the proposal would grant federal transferee courts ancillary subject-matter jurisdiction over claims and indemnification arising "from the same transaction, occurrence, or series of related transactions or occurrences" as a claim already transferred,⁶⁴ thus enabling aggregation

63. ALI TENTATIVE DRAFT 2, *supra* note 8, at 133 (proposed 28 U.S.C. § 1453). It may too readily escape notice that the draft would allow removal by any "party," and not just defendants as is the case under present removal statutes. The reference to "one or more parties" also makes it unnecessary to get all defendants to seek removal as is often the case in present practice, a sensible difference given the purposes of the proposed jurisdiction.

64. *Id.* § 5.03(a)(1)-(2). The new federal supplemental jurisdiction statute adopted late in 1990, 28 U.S.C.A. § 1367 (West Supp. 1991), would have only limited effect in facilitating consolidated treatment of complex litigation. That statute is meant to permit pendent parties in non-diversity cases, generally to codify existing pendent and ancillary jurisdiction practice, and not to disturb such major obstacles to consolidation in complex cases as the complete diversity requirement. *See, e.g.,* Mengler, Burbank, & Rowe, *Congress Accepts Supreme Court's Invitation to Codify Supplemental Jurisdiction*, 74 JUDICATURE 213 (1991).

Professor Epstein questions whether the breadth of consolidation under the ALI proposal would pass muster under Supreme Court articulations of what constitutes a "case" under Article III. *See* Epstein, *supra* note 29, at 38-42. His argument draws heavily on irrelevant discussions from cases in which the Supreme Court has construed statutory rather than constitutional jurisdiction and entirely omits mention of unchallenged, broad joinder and consolidation provisions such as Federal Rules of Civil Procedure 20(a) (joinder of parties permitted when claimed rights to relief "arise out of the same transaction or occurrence or series of transactions or occurrences and if any questions of law or fact common to all [plaintiffs or defendants] will arise in the action"), 23(b)(3) (class action permissible if, among other factors, "questions of law or fact common to members of the class predominate over any questions affecting only individual members"), and 42(a) (trial courts may order consolidation of pending "actions involving a common question of fact or law"), and 28 U.S.C. § 1407(a) (1988) (permitting interdistrict transfer and consolidation of "civil actions involving one or more common questions of fact"). In any event, problems of constitutional overreach in this context could be well handled by findings of unconstitutionality in particular cases, rather than a facial strikethrough or by refusing to use language that is wholly unexceptionable in present practice.

of transferred actions filed in federal court with those allowed removal from state court. The authorization of ancillary jurisdiction includes no minimum number of claimants or amount in controversy requirement. Instead, section 5.01(a) lists factors for Panel consideration, including: number and size of actions; amount in controversy; special reasons to avoid inconsistency of result; and possible cooperation or coordination with state courts where cases are lodged, to "determine whether the removal and consolidation of the cases is [sic] warranted and to ensure that removal will not unduly disrupt or impinge upon state court proceedings or impose an undue burden on the federal courts."⁶⁵

The intersystem coverage of Tentative Draft 2 also raises some federalism problems. The draft proposes to revise removal procedure in section 5.02, relaxing the time period of the general removal statute⁶⁶ to facilitate consolidation.⁶⁷ In further sensible contrast to general removal practice, under which initiating the process effects removal without court action (subject only to later federal court remand for improper removal) and bars continued state court action until remand,⁶⁸ the draft's proposal avoids stranding the action in limbo while the Panel decides whether to remove a complex case by delaying the effect of the ban on state court action until the Panel issues an order removing and transferring the case.⁶⁹ To resolve any question about ability to enjoin related matters still pending in other courts, section 5.04 would allow the transferee court to "enjoin related proceedings . . . whenever it determines that the continuation of those actions substantially impairs or interferes with the consolidated actions and that an injunction would promote the just and efficient resolution of the actions before it."⁷⁰

65. *Id.* § 5.01(a).

66. *See* 28 U.S.C. § 1446(b) (1988) (thirty days for removal after service of initial pleading or summons, or in case of action not originally removable, thirty days after defendant receives paper "from which it may first be ascertained that the case is one which is or which has become removable").

67. *See* ALI TENTATIVE DRAFT 2, *supra* note 8, § 5.02(c) (ninety days from commencement of action in state court, thirty days from when party was joined to action, or thirty days after addition of removable claim; also at any time when timely removal notice in related action is pending before Panel, within thirty days of a Panel consolidation order, or at any time when state judge files certification seeking removal).

68. *See* 28 U.S.C. § 1446(d) (1988).

69. *See* ALI TENTATIVE DRAFT 2, *supra* note 8, § 5.02(e).

70. *See also id.* § 5.04(b) (criteria to consider in deciding whether to issue such an injunction).

In Tentative Draft 2, the Reporters saved the best—at least for procedure junkies—for last. All proposals discussed to this point have dealt solely with claims already filed in court. Complex litigation, however, will often have many matured but unfiled satellite claims, dormant for reasons varying from lassitude to tactical efforts at lying low in the hope of reaping the benefits of victory while avoiding the risk of defeat. Ignoring such claims could undermine the effort to deal as fully as possible with large multiparty, multiclaim cases. Yet smoking out matured claims unfiled but not time-barred is a sensitive matter on all sides, perhaps stirring up unnecessary litigation and liability but also raising significant problems of sufficient fairness to the potential claimants if they could lose their claims and have not yet undertaken to defend their interests.

The Reporters cut this Gordian knot in section 5.05 with a proposal for a procedure involving a court-ordered opportunity for intervention along with issue (but not claim) preclusion of all who receive notice. In brief, a transferee court on motion or on its own initiative could inform nonparties with related, unasserted claims that they could intervene to press their claims, but in any event that they would both benefit from determinations made in the consolidated action and be bound by rulings on issues specified by the court in the notice sent to them. The court could issue such an order upon determining that the claims met the usual criteria of transactional relatedness and that the intervention would further efficient, consistent resolution of all claims without unduly prejudicing or burdening parties or nonparties. The procedure would require an opportunity for the parties and nonparties to appear and argue against the use of the intervention-preclusion device. But only generally applicable interlocutory review statutes would govern review of the court's decision to proceed, without special provision for appeal.⁷¹

The commentary following section 5.05 gives a detailed explanation and defense of this procedure, to which I cannot do full justice in this broad survey. First, the proposal deals sensibly with the problem of "one-way intervention," which describes nonparty efforts to exploit preclusion doctrine by staying out of a litigation

71. See *id.* § 5.05.

and then claiming in a later suit the benefits of nonmutual issue preclusion from favorable rulings, while avoiding preclusion from unfavorable rulings because of nonparty status.⁷² The proposed device would limit the severity of this result by leading only to issue, and not claim, preclusion. In some cases, however, issue preclusion will resolve most or all matters that might have been seriously contested.

The Reporters defend the constitutionality of their proposal on several grounds, including: the preclusion of only those who *receive* notice, the opportunities to object and to intervene, the nationwide personal jurisdiction of the transferee court, and the limits on the device both from the criteria in the proposal and by the usual requisites for preclusion.⁷³ Rather than criticism, this proposal deserves consideration for adaptation beyond the context of special complex litigation provisions because it might offer a solution to the problems created by the Supreme Court's 1989 decision in *Martin v. Wilks*.⁷⁴ There, the Court held as a matter of interpretation of present procedural rules that nonparties to a consent decree were entitled to challenge the decree despite the fairness hearing held before its entry. The proposed intervention-preclusion procedure could protect the interests of both parties and nonparties while stabilizing consent decrees and litigated judgments alike.

At this point, it may be wise to pause in this rapid tour of complex proposals for complex litigation to discuss whether H.R. 3406 and ALI Tentative Draft 2 are compatible with existing federal court jurisdiction, especially general diversity jurisdiction, or if they would require even greater revision than first appears necessary. Given the different ways these two proposals approach many of the same issues, a second concern is the extent to which H.R. 3406 and ALI Tentative Draft 2 are compatible with each other or whether we must choose between them.

Regarding compatibility with existing jurisdictions, both proposals are designed to fit within the present structure with only

72. *See id.* comment a.

73. *See id.* comment b. For Epstein's critique of the intervention-preclusion proposal and suggestion of an alternative involving election by parties whether to be benefitted and burdened or neither, *see* Epstein, *supra* note 29, at 59-60.

74. 490 U.S. 755 (1989).

minor changes. Exemplifying this compatibility, Tentative Draft 2 proposes no new original federal jurisdiction and requires only a broadened ancillary jurisdiction to support removal efforts for consolidation with related cases already before the federal courts. In the unlikely event that Congress abolishes the general diversity of citizenship jurisdiction, complex cases in state courts will merely have one less major federal jurisdiction to which they could be ancillary. The abolition of this jurisdiction, however, would make the third level of consolidation, among state systems, more important because the federal courts—absent a special minimal diversity-based jurisdiction like that in H.R. 3406—would no longer serve as a consolidation forum for state-law cases. As for H.R. 3406, it could exist either alongside or in the absence of general diversity jurisdiction. Some (including me) hope that the focus of H.R. 3406 on a rational use of the federal forum for interstate cases could hasten the demise of the anachronistic, anomaly-ridden breeder of wasteful procedural litigation and federal fumbling with state matters that now passes for a major ground of federal jurisdiction. But abolishing the old jurisdiction is not a prerequisite to implementing the new one, and I expect the old one to outlive me.

Regarding the second question of compatibility, H.R. 3406 and the ALI's federal-state intersystem proposal should not be on the books simultaneously. The minimal diversity-based jurisdiction of H.R. 3406, which is targeted on single-accident mass torts, can be invoked by original filing as well as removal and requires relatively limited involvement of the Panel. This scheme should not coexist with the ALI proposal, which differs on each of these particulars.

Nonetheless, proponents of complex-litigation reform need not divide into camps (otherwise my involvement with both efforts would long ago have caused me to seek either treatment for schizophrenia or protection from charges of collaboration with the enemy). Rather, one can readily view H.R. 3406 as a limited, experimental first step toward expanding the federal judiciary's role in dealing with mass-tort cases. Even if this cautious test of the utility and feasibility of broadened federal judicial involvement proved unsatisfactory, the reasons for its failure could be instructive for whether the effort should be abandoned or undertaken along different lines. And if experience with H.R. 3406 were favorable, it could provide useful groundwork for the much more

comprehensive, visionary, and ambitious structure of the ALI proposal. The differences, then, may be those of phases in a succession rather than contemporaneous conflict.

C. *ABA Commission on Mass Torts*

The three main proposals for federal-state intersystem consolidation showcase different uses of the main constitutional bases of federal court jurisdiction to approach the same general problem. H.R. 3406 would rest on minimal diversity, broader than the complete diversity required under the firmly entrenched interpretation of the general diversity jurisdiction statute but accepted as a constitutional exercise of congressional power under Article III.⁷⁵ In contrast, ALI Tentative Draft 2 would use broad ancillary jurisdiction over added claims and parties, the latter something of a stepchild in current Supreme Court interpretations of jurisdictional statutes⁷⁶ but not subject to serious constitutional question.⁷⁷ The ABA Commission on Mass Torts would retain state law as the main governing substantive law, but would have Congress exercise its power to regulate interstate commerce to federalize law choice in mass-tort litigation and impose limits on punitive damage awards in such cases. On this foundation, Congress would declare that such actions "arise under" the Constitution and laws of the United States and thus come within original federal court jurisdiction. Like the other two proposals, this assertion of federal jurisdiction would exceed conventional statutory definitions⁷⁸ without raising serious constitutional problems.⁷⁹

75. See *supra* note 39.

76. See *Finley v. United States*, 490 U.S. 545, 549 (1989) ("[W]ith respect to the addition of parties, as opposed to the addition of only claims, we will not assume that the full constitutional power has been congressionally authorized, and will not read jurisdictional statutes broadly.").

77. See *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966) (if state and substantial federal claims "derive from a common nucleus of operative fact," and "are such that [a plaintiff] would ordinarily be expected to try them all in one judicial proceeding, then . . . there is power in federal courts to hear the whole.") (emphasis in original) (footnote omitted).

78. See *Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149 (1908) (interpreting general federal question jurisdictional statute to require that federal question appear in what has come to be referred to as plaintiff's "well-pleaded complaint"). For a modern statement of the "well-pleaded complaint" rule, see *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 9-12 (1983).

79. See *infra* note 90 and accompanying text.

Of the three proposals, the ABA Commission would set the highest thresholds; to be eligible for consolidation, a mass tort would have to involve

at least 250 civil tort claims arising from a single accident or use of or exposure to the same product or substance, each of which involves a claim in excess of \$50,000 for wrongful death, personal injury or physical damage to or destruction of tangible property . . . pending in different federal district courts or in one federal district court and one or more state courts.⁸⁰

Thus the ABA Commission proposal, like ALI Tentative Draft 2 but unlike H.R. 3406, would apply to mass exposure as well as single-accident torts, but its high thresholds would exclude even many major airplane crashes. The Commission majority's reasons for the high thresholds included insufficient need for consolidation in smaller cases and concern both about federal court intrusion on state jurisdiction and about the possible interference from consolidation with attorney-client relationships.⁸¹ The Commission also believed that it would be useful to gain experience under a system whose high thresholds would reduce grounds for apprehension. Another limiting feature, the ABA group's focus on wrongful death, personal injury, and physical property damage, would exclude such torts as fraud, which the ALI's transactional relatedness focus would reach.

The ABA Commission described other main features in the Executive Summary of its Report to the House of Delegates:

[R]ecogniz[ing] that all mass tort cases are not alike . . . the Commission recommends that Congress establish a judicial panel to make an initial determination as to whether some or all individual cases should be consolidated before a single federal court for some or all purposes. Before directing consolidation of some or all cases before a federal court, the panel would be required to consider several factors including "the availability of a single state court before which some or all cases can be consolidated and effectively managed." If consolidation before a federal court is directed, that court would be vested with broad discretionary authority necessary for effective management of the litigation and empowered, but not required, to resolve all issues including liability and damages.⁸²

80. ABA Commission Report, *supra* note 12, Recommendation 2(a)(1).

81. *See id.* at 27-28.

82. *Id.*, Executive Summary at 2.

The ABA Commission proposal shares both the ALI draft's emphasis on the discretionary role of a judicial panel in consolidation and its explicit concern for relations between the state and federal courts expressed in the criteria guiding the consolidation decision.⁸³

The most innovative aspect of the ABA Commission's Report is its jurisdictional basis. The Report stopped short of recommending the imposition of federal substantive law on mass-tort litigation; precluding the evolution of such a distinct governing law would, to begin with, usefully limit the incentives for litigating whether a case comes within the mass-tort jurisdiction. The Commission concluded that mass-tort litigation could benefit from consolidation regardless of what law governed, that federalizing substantive mass-tort law could intrude on areas of traditional state authority, and that the issue of federal substantive regulation should stand or fall on its own merits.⁸⁴ Simultaneously, the Commissioners believed that the happenstance of failing to satisfy the minimal diversity requirement should not preclude the availability of a useful consolidation system furthering a substantial federal interest, even though either jurisdictional approach would likely achieve similar results.⁸⁵

83. See *supra* text accompanying note 65.

84. See ABA Commission Report, *supra* note 12, at 36-37.

Professors Epstein and Mullenix argue that creating federal substantive law for complex tort cases would be preferable to other ways of supporting federal complex litigation jurisdiction. See Epstein, *supra* note 29, at 31-32; Mullenix, *supra* note 39, at 197-98, 222-23. Professor Epstein's support of "uniform federal standards," Epstein, *supra*, at 32, is puzzling, for he earlier criticizes the ALI proposals' reliance on consistency of results as one reason for a special federal jurisdiction, speaking of "a system of federalism that locates in the states the dominant source of both torts and conflict of laws," *id.* at 21, and a "shared consensus" about a "sense of comity over the proper division of power between state and federal governments" that supports "the decision to go slow on federal tort law," *id.* at 22. Whatever the merits of the general idea of federalized tort law, for complex cases or more broadly, the controversy over both appropriateness and substance of such a regime would be likely to make it politically much less salable than the current proposals that rely on state substantive law when it applies. The best, if that is what federalizing tort law would be, can be the enemy of the good.

85. See ABA Commission Report, *supra* note 12, at 43-44. Indeed, it is doubtful whether a federal forum would be appropriate for a state-law case involving only citizens of the same state. Although the ABA Commission's Report provides for the federal complex litigation panel to consider state interests and the availability of a state forum in deciding whether to order federal court consolidation, see *id.* at 2d (draft Federal Mass Tort Jurisdiction Reform Act § 103(d)(10)-(12)), no reason comes to mind why it should ever make sense for the federal courts to assume jurisdiction over such a case. Thus Professor Mullenix's criticism of diversity-based proposals for inability "to capture all related cases for consolidated adjudication," Mullenix, *supra* note 39, at 220, seems mis-

Accordingly, the Report proposes that Congress "enact, pursuant to its power to regulate interstate commerce, legislation to permit individual actions arising in litigation declared to be 'mass-tort litigation' by a federal judicial panel to be filed in or removed to a federal court without regard to the citizenship of the parties."⁸⁶ When the panel ordered specified actions consolidated in federal court, "all such pending actions and all such other tort claims as the panel may specify" should "thereafter be deemed to arise under the laws of the United States."⁸⁷ In addition to the federal interest in matters affecting interstate commerce, both the recommended statutory authority for federal transferee courts to apply federal common-law rules for choice of state law to govern in mass-tort cases⁸⁸ and the proposed standards for punitive damage awards justify this statutory assertion of federal question jurisdiction.⁸⁹ Although no federal substantive tort law would govern key issues of liability and compensatory damages, Supreme Court precedents old and new settle that this much involvement of federal law in defining litigants' rights provides ample constitutional foundation for Congress to assert federal question jurisdiction.⁹⁰

placed. And such jurisdictions should capture the vast majority of appropriate cases in any event.

A different rationale may still provide some support for the Commission's choice of a jurisdictional approach: the greater propriety of making substantive changes in the law of punitive damages as proposed by the ABA Commission if the basis of the jurisdiction is federal question rather than diversity. Conversation with Prof. Frank F. Flegal, Georgetown University Law Center, Consultant/Reporter to the Commission, Mar. 28, 1991.

86. ABA Commission Report, *supra* note 12, Recommendation 3, at 6-7.

87. *Id.* Recommendation 3(a), at 6.

88. *See id.* Recommendation 4, at 7. While concurring with the approach used in H.R. 3406 of authorizing a federal common law regarding choice of law, the report departs from that proposal by omitting a statutory preference in favor of applying the law of a single jurisdiction. *See supra* text accompanying notes 60-61.

89. *See* ABA Commission Report, *supra* note 12, Recommendation 5, at 7.

90. *See* *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480 (1983) (federal codification of sovereign immunity law suffices for constitutionality of statutory grant of federal question jurisdiction over foreign government entities); *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824) (federal question jurisdiction is constitutional when federal question "forms an ingredient of the original cause"); ABA COMMISSION REPORT, *supra* note 12, at 46 n.77 (arguing constitutionality of federal question jurisdiction as proposed in Report). The Report seems entirely correct in taking the position that basic principles governing the constitutional scope of federal question jurisdiction amply support the constitutionality of its proposal, without resort to exotic and untried theories such as "protective jurisdiction." *See id.*

I am duty bound to call the reader's attention to contrary arguments in Epstein, *supra* note 29, at 42-49, and Mullenix, *supra* note 39, at 180-81, 198-206. As one associated with other proposals and without a dog in this fight, I will let the Commission's report

The ABA Commission recognized and addressed key issues treated in other proposals. The initiative for consolidation could come from the federal mass-tort litigation panel, from any court presiding over a tort action, or from any party to such an action, with the panel making the initial decision whether to order consolidation.⁹¹ Under this arrangement the parties could neither claim consolidation as a matter of right nor veto it, with the panel instead "able to evaluate the costs and benefits of consolidation in the context of particular litigation."⁹² Parties could obtain review of some panel orders, including decisions to transfer and consolidate, by extraordinary writ only; denials of transfer would be unreviewable.⁹³ The Report treats the appeal of both interlocutory decisions and orders of the transferee court with a uniform approach. It would authorize prompt review at the discretion of the court of appeals, with no automatic stay of district court action

speak mostly for itself. Professor Epstein, questioning the constitutionality of a federal question jurisdictional basis on which the ALI proposals he criticizes do not rely, discusses the specific facts of *Osborn* and *Verlinden* while ignoring the opinions' broad rationales, and tries to square the circle by using a case involving solely the construction of the federal question jurisdictional statute, *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804 (1986), to limit the constitutional precedents. Professor Mullenix focuses mainly on the needlessly complex protective jurisdiction basis and appears to make the mistaken assumption that the ALI's ancillary jurisdiction-based proposal involves "expanded federal-question jurisdiction." See Mullenix, *supra*, at 190.

Like H.R. 3406 with its minimal diversity grounding and ALI Tentative Draft 2 with its use of ancillary jurisdiction, *see supra* text following note 74, the ABA Commission proposal for a mass-tort jurisdiction based on the presence of a federal question should comport with existing federal jurisdictions. It would add a new, highly focused authority alongside the present broad ones, and by not relying on parties' citizenship or ancillary jurisdiction would avoid being affected if the general diversity jurisdiction were abolished or further limited.

91. See ABA Commission Report, *supra* note 12, at 2d-3d (draft Federal Mass Tort Jurisdiction Reform Act § 103(c)-(d)).

92. *Id.* at 26. The Report's proposed mechanism, however, seems to treat actions filed in federal and state courts somewhat differently. The panel would decide whether to transfer actions pending in different federal districts, *see id.* at 2d (draft Federal Mass Tort Jurisdiction Reform Act § 103(c)), presumably whether they had come by original filing or ordinary removal. Once the panel had ordered transfer and consolidation of the federal cases, removal by any party to a state case would be needed to combine it with the federal action. *See id.* at 3d (draft Federal Mass Tort Jurisdiction Reform Act § 104). The Report and its proposed statute do not deal with timeliness of removal, which could be a gap in need of filling. It now appears ambiguous whether removal from state court to the transferee federal court could occur at any time, which could be too lax and leave too much room for disruption, or whether the thirty-day limit in the general removal statute, 28 U.S.C. § 1446(b) (1988), would govern, which might be too strict.

93. See *id.* at 3d (draft Federal Mass Tort Jurisdiction Reform Act § 103(f)).

pending appeal,⁹⁴ rather than special review of specific actions such as rulings on liability.⁹⁵

Concerning the treatment of nonparties, which is omitted from H.R. 3406 but addressed in ALI Tentative Draft 2's intervention-preclusion proposal,⁹⁶ the ABA Commission distinguished between two classes: "fence sitters," who have matured claims but choose not to join the aggregated proceeding, and future claimants, who may have suffered exposure to a substance like asbestos or DES but do not yet exhibit illness or injury. The Report cites several reasons for excluding coverage of future claimants from its proposal⁹⁷ and penalizes fence sitting by forbidding further awards of punitive damages in later actions⁹⁸ and threatening the denial of "evidentiary or other benefit,"⁹⁹ presumably including offensive, nonmutual issue preclusion. The Report hints that the ABA group might have considered a proposal like the ALI's but was limited by the short period between the Supreme Court's decision in *Martin v. Wilks*¹⁰⁰ and the deadline for the Commission's report.¹⁰¹ The Report also addresses several issues concerning the management powers of the transferee court¹⁰² and other problems beyond the scope of this Article, such as limits on punitive damage awards, scientific and medical questions, attorney's fees and litigation expenses, and alternative dispute resolution.

One member of the Commission, plaintiffs' attorney Paul Rheingold, dissented from the Report.¹⁰³ In his view the serious

94. See *id.* at 7d (draft Federal Mass Tort Jurisdiction Reform Act § 111); see also *id.* at 84-85 (discussion of issues concerning review of transferee court decisions).

95. See *supra* text accompanying notes 29 (under ALI proposal, discretionary review of transferee court liability determination), 54-56 (review of such determinations as of right in H.R. 3406).

96. See *supra* text accompanying notes 70-74.

97. See ABA Commission Report, *supra* note 12, at 22-24. The reasons for excluding future claimants include a preference in some situations to allow for their claims in bankruptcy proceedings, doubt whether some future claims legally exist yet so as to be subject to adjudication, the complexity that would be added to a consolidated mass tort action, and the problem that present proceedings would not benefit from improved scientific evidence that might be available when the future plaintiffs' claims mature.

98. See *id.* at 7d (draft Federal Mass Tort Jurisdiction Reform Act § 110(d)(1)).

99. See *id.* at 7d-8d (draft Federal Mass Tort Jurisdiction Reform Act § 112) (presumptive denial of "evidentiary or other benefit of a judgment entered against a defendant" in consolidated action, with grounds for possible exemption).

100. See *supra* text accompanying note 74.

101. See ABA Commission Report, *supra* note 12, at 86.

102. See *id.* at 58-70.

103. See *id.* app. E.

problems in mass-tort litigation arise in a small number of huge product-liability cases that lead to tens of thousands of claims; of these, he contends, only three resulted in mass litigation: asbestos, Agent Orange, and the Dalkon Shield.¹⁰⁴ He argues that these major cases require more drastic treatment than the Commission proposed, and that smaller actions—typified by “the run-of-the-mill mass personal injury case”¹⁰⁵—do not suffer problems serious enough to demand the Report’s recommended cure.¹⁰⁶

The Commission’s Report went before the February 1990 mid-year meeting of the ABA House of Delegates, but was withdrawn before a vote after a “barrage of last-minute criticism.”¹⁰⁷ H.R. 3406, then pending in the House of Representatives, also came up for consideration;¹⁰⁸ critics saw H.R. 3406 as “an intrusion on state sovereignty” and as “creating a federal law of product liability.”¹⁰⁹ These opponents also questioned the adequacy of the efforts to limit the bill’s coverage to single-accident mass disasters and to exclude products-liability cases. Finally, some objected to the low 25-person threshold that could move claimants from state courts to distant federal courts, even when most plaintiffs had settled.¹¹⁰ Despite some support for the proposal, the House of Delegates voted to withhold its approval.¹¹¹

104. *See id.* at 2e.

105. *Id.* at 2e-3e.

106. *See id.* The Federal Courts Study Committee, while supporting a special federal jurisdiction for multiparty, multiforum litigation, *see* FCSC REPORT, *supra* note 1, at 44-45, also recommended consideration of tailored measures for the small number of mega-cases that concerned Commissioner Rheingold. *See id.* at 46. One can agree that the problems of such cases are unique and may profit from special treatment, and still see enough problems in smaller mass-tort litigation to call for new measures. Even the Hyatt Skywalks litigation, conducted in one federal and one state court and generally regarded as fairly successful, with settlements eventually reached in both courts, got tied up for several months by a dispute over the federal court’s attempt to certify a mandatory class action and suffered from some other intersystem conflict. *See* Rowe & Sibley, *supra* note 4, at 43 and sources there cited.

107. *See* ABA Backs Abortion Rights, Right to Die, and Job Protection, 58 U.S.L.W. 2474, 2477 (Feb. 20, 1990).

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* The Commission concluded that the preparation and submission of the report had fulfilled its mandate from the ABA, and the group has disbanded. Telephone conversation with Prof. Frank F. Flegal, Georgetown University Law Center, Consultant/Reporter to the Commission, Mar. 6, 1991.

IV. Interstate Transfer

Federal courts now preside over at least some aspect of most multiparty, multiform suits, sometimes because federal claims exist and frequently because many parties can use diversity jurisdiction. The courts of one or more states often conduct large parts of such litigation, however, because plaintiffs either bring state claims against co-citizens and cannot choose federal court or prefer state court and sue home-state defendants to keep cases there.¹¹² When such cases arise, especially if no federal complex-litigation jurisdiction exists to effect full consolidation, partial consolidation in one state system might simplify the handling of cases filed in several states. Even without regard to large, complex matters, transfer of a simple state court case to join related litigation in another state could work more smoothly than the main device available today, dismissal of an action on *forum non conveniens* grounds for refiling elsewhere.

Nine years ago Professor Elinor Schroeder argued for an interstate agreement on transfer and consolidation for pretrial proceedings when related litigation was pending in courts of different states.¹¹³ Only recently, however, has a detailed proposal for interstate transfer, the draft Uniform Transfer of Litigation Act from the National Conference of Commissioners on Uniform State Laws, begun to surface. As the title reflects, the Commissioners chose the form of a Uniform Act rather than the interstate compact implied by Professor Schroeder's proposal. Before any discussion of the salient features of the draft Uniform Act, it may be useful to mention some issues that arise with interstate transfer that appear to have influenced the choices reflected in the draft.

The first issue involves the wisdom of creating a coordination mechanism for interstate transfer, like the existing federal Judicial Panel on Multidistrict Litigation. Such a coordinating body might be valuable, but problems could arise with its size (would there have to be representation from all participating states?) and with ensuring the participation of judges who have long dockets at

112. See 28 U.S.C. § 1441(b) (1988) (forbidding removal in non-federal question cases when any defendant is forum state citizen).

113. Schroeder, *Relitigation of Common Issues: The Failure of Nonparty Preclusion and an Alternative Proposal*, 67 IOWA L. REV. 917, 965-66 (1982). See also Note, *The Consolidation of Multistate Litigation in State Courts*, 96 YALE L.J. 1099 (1987).

home and often lack the protection of life tenure. Further, any effort to coordinate the state and federal systems by a mixed body of federal and state judges would raise serious problems under Article III if the body addressed the transfer of cases to or within the federal courts in anything other than an advisory capacity. Another issue, to give just one more example, arises from the narrower constitutional scope of state courts' personal jurisdiction compared to that which the federal system can constitutionally exercise.¹¹⁴

The draft Uniform Transfer Act finesses these and several other thorny problems with an elegant simplicity.¹¹⁵ Its core provisions authorize both the court with jurisdiction and "the parties [to] transfer all or any part of the action to a court not of this State"¹¹⁶ and receipt "of an action or any part of an action"¹¹⁷ according to criteria and procedures elsewhere in the draft Act. A first characteristic of this basic authorization is that enactment of parallel legislation is not essential for either transfer or receipt; courts of a state that had passed the Act could transfer a case to or receive a case from any court in any system—state, federal, or foreign—that regarded itself as authorized to be a receiving or transferring court.¹¹⁸ This form of authorization also eliminates the need for any coordinating body and places the decision to transfer entirely in the hands of the judges of the two systems involved, both of which must consent to the transfer for it to take place.¹¹⁹

114. See *supra* note 29 and accompanying text.

115. See generally Toran, *'Tis a Gift to Be Simple: Aesthetics and Procedural Reform*, 89 MICH. L. REV. 352 (1990) (discussing the value and consequences of simplicity as an aesthetic goal of legal procedural reform).

116. Draft Uniform Transfer Act, *supra* note 14, § 102.

117. *Id.* § 201.

118. Without changes in federal law, federal courts would presumably regard themselves as lacking authority to accept transfer as such, because Congress has provided in the removal statutes for the means by which cases can be moved from state to federal court. Accepting transfer could circumvent the limits in the removal provisions. Courts of other states without the Act might plausibly go either way on whether they could accept transfer—rejecting it on the theory that the channel for bringing an action into the system was to file a complaint, or accepting on the ground that the transfer was an authorized act of the courts of another state.

119. See Draft Uniform Transfer Act, *supra* note 14, §§ 204 ("A receiving court may refuse to accept transfer for any reason, but shall state the reasons for the refusal."), 106 ("A transfer takes effect when an order accepting transfer is filed in the transferring court."). Consensual acceptance by the receiving court, then, is a precondition for the transfer to take effect.

Further, the draft omits any scale requirements, so that transfer could be used for litigation both large and small—as an alternative to *forum non conveniens* dismissal when no related action was pending in the receiving system, to join two small but related actions, or to consolidate complex matters.

Such sweeping authority prompts questions about personal jurisdiction. The draft's response is not timid, essentially pushing the constitutional limits as they might be broadly defined in light of the multistate concerns underlying the proposal: A transferor court with full subject matter and personal jurisdiction may transfer an action in whole or in part to any consenting court with subject matter jurisdiction,¹²⁰ and when its own jurisdiction has any defect may similarly effect transfer to any consenting court with subject matter and personal jurisdiction.¹²¹ Parallel provisions authorize a court with full jurisdiction to accept transfer without regard to the jurisdiction of the transferring court,¹²² and allow a court with subject matter jurisdiction to "assert jurisdiction over a party that is subject to the jurisdiction of the transferring court."¹²³ In some applications, transferee courts would find themselves lacking constitutional authority,¹²⁴ which should present a problem no greater than when a court finds that its state's long-arm statute authorizes service but that the defendant lacks the constitutionally required minimum contacts with the state. Short of such holdings of constitutional overreach as applied, the net effect of these broad transfer provisions would give state courts a transfer authority parallel to or beyond the authority federal courts derive from sections 1404(a), 1406(a), 1407(a), and 1631.¹²⁵

120. *See id.* § 102.

121. *See id.* § 103.

122. *See id.* § 202.

123. *Id.* § 203.

124. For cases in which the receiving court "determines after accepting transfer that it lacks jurisdiction of a part of the matters transferred by a court that had jurisdiction, it may return that matter and any additional matters to the transferring court." *Id.* § 215. The desirability of interstate consolidation of a complex action, however, could open up new ground for argument about how to define the constitutional limitations on state courts' personal jurisdiction in multistate cases.

125. 28 U.S.C. § 1404(a) (1988) provides for transfer "[f]or the convenience of parties and witnesses, in the interest of justice" of "any civil action to any other district or division where it might have been brought." For cases in which venue is laid in the wrong division of district, the district court may dismiss "or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought."

This sweeping transfer authority raises further questions regarding what criteria govern its exercise, who can initiate its use, which substantive law and statutes of limitations apply, how retransfer after partial proceedings (as for damages determinations after a combined liability ruling) is accomplished, and who shall review transfer rulings. In keeping with its general simplicity, the draft Act permits transfer "to serve the fair, effective, and efficient administration of justice and the convenience of the parties and witnesses," directing the transferor court to "consider all relevant factors, including the interest of each plaintiff in selecting a forum and the public interest in securing a single litigation and disposition of related matters."¹²⁶ As for initiative, "A transfer may be ordered on motion of a party or the court's own motion after notice and opportunity to be heard."¹²⁷

To deal with choice of law and other matters concerning the relation between the two court systems, the draft attempts an ingenious compromise: Authority lies in the transferring court to "specify terms of transfer"¹²⁸ in the transfer order, from which the receiving court "for good cause may depart."¹²⁹ Once a transferee court has accepted and begins processing a case, then, it enjoys the primary authority to deal with all issues without being bound by directives of the transferor court, although it would presumably give them some deference. Concerning limitations, if the transferring court had full jurisdiction, the transferee court may not dismiss a claim on limitations grounds if the transferor court would not have done so.¹³⁰

The transfer order might contemplate retransfer to the transferring court for individual damages determinations after common

28 U.S.C. § 1406(a) (1988). Section 1407(a), focusing on multidistrict litigation, permits transfer by the Judicial Panel on Multidistrict Litigation of "civil actions involving one or more common questions of fact" "to any district for coordinated or consolidated pretrial proceedings." 28 U.S.C. § 1407(a) (1988). Section 1631, especially useful for cases misfiled in a generalist or specialized federal court when they should have been filed in one of the other type and for appeals from administrative action filed in the wrong federal court, authorizes transfer "if it is in the interest of justice" from a federal court that finds itself without jurisdiction to "any other such court in which the action or appeal could have been brought at the time it was filed or noticed" 28 U.S.C. § 1631 (1988).

126. Draft Uniform Transfer Act, *supra* note 14, § 104.

127. *Id.* § 105.

128. *Id.*

129. *Id.* § 208.

130. *See id.* § 209.

proceedings on liability because the transferee court "may return any transferred matter to the transferring court pursuant to the terms of the transfer order."¹³¹ In that event, the transferring court "shall accept the return."¹³² Orders granting or refusing transfer would be reviewable only by extraordinary writ, with an option for adopting states to add the possibility of permissive interlocutory appeal. Once transfer had taken effect, unreviewed rulings would become unreviewable in the transferring state "except as to matters returned or transferred back."¹³³ In the receiving state, there would be no review of the transfer order itself, with review by extraordinary writ or (again, optionally) permissive interlocutory appeal of decisions whether to accept transfer or grant return. Reflecting the primary authority of the courts of the transferee state, review would be available in the transferee state for both the rulings of the transferee court and the unreviewed rulings of the transferring court.¹³⁴

At last word, the National Conference of Commissioners on Uniform State Laws planned to consider the draft Uniform Transfer Act for adoption as a recommended Uniform Law this summer.¹³⁵ The significance of the Act for complex litigation would depend on several factors, including the breadth and speed of its adoption, the attitude taken in nonadopting states' courts toward their ability to accept transfer, and whether Congress passes any federal legislation to address complex litigation or further narrows the general diversity jurisdiction. At the least, the Uniform Act should facilitate both individual transfers and the disposition of scattered state-law suits arising out of multiple-victim single accidents that fall below any federal statutory thresholds. In the absence of federal legislation, the Act could well become a major tool for addressing large parts of multiform state-law litigation, which in turn could inspire reconsideration of some state coordinating body like the federal Multidistrict Panel.

131. *Id.* § 216.

132. *Id.* § 109.

133. *Id.* § 110.

134. *Id.* § 219.

135. Telephone conversation with Associate Dean Edward H. Cooper, University of Michigan Law School, Reporter for the Uniform Transfer of Litigation Act, March 12, 1991.

V. Conclusion

As the foregoing discussion reflects, legislating to deal with complex litigation can itself be dauntingly complex. It is often impracticable or at least unwise to change transfer powers, or create a new federal court subject matter jurisdiction, without first considering and addressing several related matters, including transfer authority and guidelines, removal procedure, personal jurisdiction, venue, joinder, choice of law, enjoining other proceedings, service of process and subpoenas, and appeal.¹³⁶ In addition, these efforts to facilitate the consolidation of scattered, related litigation raise many issues of aggregation's desirability and even constitutionality, which other contributions to this symposium address. One of the more significant, if relatively less noted, issues involves the wisdom of conferring on a single judge the great sweep of authority—in many respects confined only by the lax abuse-of-discretion standard—over the conduct of massive actions that many of these proposals contemplate.¹³⁷ Inevitably, unless we revive the unlamented three-judge district courts, the leverage and impact of a single trial judge's actions will increase as more large, complex litigation takes place. Still, concern for unchecked power can valuably remind us of the importance of providing both guidelines for trial judges' actions and some amount of review without inviting costly, time-consuming piecemeal appeals.

A further concern, when complex-litigation reforms would consolidate state-law cases in federal court, is with the intrusion on federalist values, not to mention any net addition to federal court caseloads. These proposals, however, often try to minimize federal-state friction by such measures as retaining state substantive law and remanding to state courts for individual damage determinations.¹³⁸ Beyond general federalist doubts lie more specific constitutional issues, especially arguments questioning both the

136. An instructive analogy is the comparatively simple federal statutory interpleader jurisdiction, which in scattered sections of the Judicial Code provides for minimal diversity subject matter jurisdiction, the joinder device of interpleader, deposits in court, venue, nationwide service of process, and enjoining claimants from conducting other proceedings. See 28 U.S.C. §§ 1335, 1397, 2361 (1988).

137. See Epstein, *supra* note 29, at 3, 9.

138. Professor Mullenix taxes some proposals for inconsistency in calling for a national forum for a national problem and then providing for remands that would make "state courts the dumping grounds for undesirable complex cases." Mullenix, *supra* note

basis for personal jurisdiction over claimants in distant transferee forums and the potential loss of the individual due process rights of a day in court. The standard for minimum contacts in a federal transferee court, however, leaves little doubt about the basic constitutionality of even long-distance transfers,¹³⁹ which, after all, occur already for pretrial proceedings in many state-law cases in federal courts under section 1407(a). Concern for litigants burdened by such actions as transfer to distant forums is genuine and worthy of respect in the framing and administration of complex-litigation structures,¹⁴⁰ but these considerations rarely rise to a constitutional level.

Concerns for litigant autonomy also raise serious questions but again do not pose insuperable constitutional problems. The authority of American courts to bind absentees through adequate representation of their interests is well settled.¹⁴¹ Again, the strongest opponents of consolidation measures may overlook how much unchallenged consolidated and representative litigation takes place already under our existing patchwork of constitutionally ap-

39, at 220-21. The argument ignores that both considerations of limiting federal intrusion on state matters and respect for forum choices and party convenience support such remands for individual damage determinations, after the federal consolidation court has served the main purpose of the complex litigation jurisdiction by dealing with common issues.

139. See *supra* note 29.

140. Professor Epstein argues at length that the ALI proposals would not yield the fairness and efficiency claimed for them. Epstein, *supra* note 29, at 5-31. Many of the possible difficulties he raises, such as deterrence of filings by threatened loss of fees as lawyers lose control over individual cases, see *id.* at 30, seem subject to treatment by sensible administration and hardly a reason not to try to make it more possible than now for courts to consider whether consolidation would be desirable.

141. See, e.g., *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 318-19 (1950) (declining to require actual service of notice on all known beneficiaries of pooled trust because "notice reasonably certain to reach most of those interested in objecting is likely to safeguard the interests of all"); *Hansberry v. Lee*, 311 U.S. 32, 41 (1940) ("the judgment in a 'class' or 'representative' suit, to which some members of the class are parties, may bind members of the class or those represented who were not made parties to it"). Even the statement in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985), that "due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an 'opt out' or 'request for exclusion' form to the court," appears to apply only in a limited context. The Court was speaking of plaintiff class members who lacked minimum contacts with the forum state, see *id.* at 811, and expressly limited its holding "to those class actions which seek to bind known plaintiffs concerning claims wholly or predominately [*sic*] for money judgments," *id.* n.3. For Professor Epstein's contrary reading of *Shutts* and critique of the ALI Project's use of the case, see Epstein, *supra* note 29, at 53-58.

proved devices: Rule 23 on class actions, including mandatory ones; Rule 42 on consolidation and severance; and section 1404(a) transfer for joint trial after section 1407 transfer for pretrial proceedings. More fundamentally, in some situations the costs and delays of insisting on individualized litigation of mass torts may practically deny justice when combined treatment can facilitate access to relief (or a decision that none is warranted) at reasonable cost to all;¹⁴² the best can be the enemy of the good.

Finally, the supporters of one or another of the jurisdictional approaches to facilitate consolidation of complex litigation should take care not to oversell them. At most these proposals address only part of our complex-litigation problems, which may also require many innovative substantive and procedural measures along the lines of compensation for risk from exposure,¹⁴³ proportionate liability for mixed-causation injuries,¹⁴⁴ and projection of trial results from sample groups onto larger claimant populations.¹⁴⁵ Still, jurisdictional and transfer measures can remove anachronistic, sometimes counterproductive obstacles to considering consolidation seriously even if it might be desirable. I still believe as I did five years ago: "The federal system can do much better than it now does with the problem of scattered litigation; a new federal jurisdiction should be part of the solution."¹⁴⁶

142. See, e.g., Newman, *Rethinking Fairness: Perspectives on the Litigation Process*, 94 YALE L.J. 1643 (1985) (suggesting more concern for aggregate effects of procedural practices on fairness to litigants, as opposed to traditional degree of focus on individual cases). See also 2 AMERICAN LAW INSTITUTE, ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY 430 (Reporters' Study 1991) ("the expected cost savings plus enhanced injury prevention from a collective process more than offset any potential deficit to deserving plaintiffs") (footnote omitted); *id.* at 431 ("We should be prepared to accept a great deal of claims consolidation if the resulting savings offer access to the tort system to new claimants who are now excluded because their claims, however valid, do not offer sufficient financial return to attract competent plaintiffs' attorneys. In other words, an averaged payment is better than no payment at all!").

143. See Rosenberg, *Class Actions for Mass Torts: Doing Individual Justice by Collective Means*, 62 IND. L.J. 561, 588-93 (1986).

144. See Brennan, *Helping Courts with Toxic Torts: Some Proposals Regarding Alternative Methods for Presenting and Assessing Scientific Evidence in Common Law Courts*, 51 U. PITT. L. REV. 1, 69-70 (1989).

145. See *Cimino v. Raymark Indus.*, 751 F. Supp. 649 (E.D. Tex. 1990).

146. Rowe & Sibley, *supra* note 4, at 48. Taking part in this symposium, and encountering other major problems as well as a range of thoughtful approaches to federal complex litigation jurisdiction and a developed proposal for interstate transfer, have brought home to me how much a new federal jurisdiction of whatever form is indeed only a moderate part of the solution—but an important part nonetheless.

Appendix A

Report of the Federal Courts Study Committee

April 2, 1990

Black letter recommendations on complex litigation

(1) Congress should amend the multi-district litigation statute to permit consolidated trials as well as pretrial proceedings and should create a special federal diversity jurisdiction, based on the minimal diversity authority conferred by Article III, to make possible the consolidation of major multi-party, multi-forum litigation.

(2) The *Manual for Complex Litigation* should include guidelines for consolidation and severance.

(3) For the small number of instances in which extraordinarily high numbers of injuries may have been caused by a single product or event, the courts should explore, and the Federal Judicial Center should analyze and disseminate information about, tailored procedures to avoid undue re-litigation of pertinent issues and otherwise facilitate prompt, economical and just disposition of claims. Congress should be alert to the need for statutory change to facilitate resolution of such mega-cases.

Appendix B

American Law Institute

Complex Litigation Project

Tentative Drafts Nos. 1 (1989) and 2 (1990)

Selected black letter sections and
proposed statutory provisions

Federal Intrasystem Consolidation

§ 3.01. Standard for Consolidation

(a) Actions commenced in two or more United States District Courts may be transferred and consolidated if:

(1) They involve one or more common questions of fact or law, and

(2) Transfer and consolidation will promote the just, efficient, and fair conduct of the actions.

(b) Factors to be considered in deciding whether the standard set forth in subdivision (a) is met include

(1) the extent to which transfer and consolidation will reduce duplicative litigation, the relative costs of individual and consolidated litigation, the likelihood of inconsistent adjudications, and the comparative burdens on the judiciary, and

(2) whether transfer and consolidation can be accomplished in a way that is fair to the parties and does not result in undue inconvenience to the parties and witnesses.

In considering those factors the court may take account of matters such as

- a. The number of parties and actions involved;
- b. The geographic dispersion of the actions;
- c. The existence, extent, and significance of local concerns;
- d. The subject matter of the dispute;
- e. The amount in controversy;
- f. The significance and number of common issues that are involved;
- g. The likelihood of additional related actions being commenced in the future;
- h. The wishes of the parties; and
- i. The stages to which the actions already commenced have progressed.

(c) When the United States is a complainant in specified actions arising under the antitrust or securities laws, it shall have the right to be exempted from transfer and consolidation.

(d) Transfer and consolidation need not be denied simply because one or more of the issues are not common so that consolidated treatment of all parts of the dispersed actions cannot be achieved. The interests of particular individual litigants can be considered when determining whether they have shown cause to be excluded from the consolidated proceeding, as provided in § 3.05(a).

§ 3.02. The Complex Litigation Panel

A special Complex Litigation Panel of federal judges shall be established and have responsibility for deciding whether

separate actions should be transferred for consolidation under the criteria set forth in § 3.01 and, if so, determining to what district court they should be transferred and consolidated in accordance with the standard set forth in § 3.04.

§ 3.03. Timing of Transfer and Consolidation

(a) Motions for transfer and consolidation and the decision whether to do so should be made as early as possible by the Complex Litigation Panel in order to give parties and counsel the earliest practicable notice and to prevent duplication of effort.

(b) The timeliness of a motion for transfer and consolidation should be determined by the Complex Litigation Panel on a case by case basis.

(c) In order to ensure that a motion before the Complex Litigation Panel does not result in any unnecessary delay of the underlying proceedings and that the resolution of the motion itself is not delayed

(1) The transferor court ordinarily should not stay any of its proceedings until the transfer and consolidation decision has been made; and

(2) The Panel ordinarily should not postpone its transfer and consolidation decision pending the resolution of motions in the transferor courts and ordinarily it should not stay any of the proceedings in the transferor courts until the transfer and consolidation decision has been made.

§ 3.04. Standard for Determining Where to Transfer Consolidated Actions

(a) Cases may be transferred and consolidated in any district court in which the just and efficient resolution of the actions will be promoted and fairness to the individual litigants can be assured.

(b) When the just, efficient and fair resolution of the actions will be promoted, the Complex Litigation Panel may designate more than one transferee court. In determining which individual cases should be assigned to which districts

when multiple transferee courts are designated, factors relevant to assuring convenience to the litigants should control.

§ 3.05. Panel Procedure

(a) The question whether any action or group of actions should be transferred for consolidation may be brought before the Complex Litigation Panel on motion of any party to any potentially affected action, at the suggestion of the court to which any such action is assigned, or on the Panel's own initiative. Parties should be permitted to show cause why their action or claims should be excluded from transfer for consolidation.

(b) A motion before the Complex Litigation Panel should be considered by a subpanel of the Panel, unless one of the members of the subpanel refers the matter to the full Panel. Any action taken by a subpanel shall be considered the action of the Panel.

(c) When the Complex Litigation Panel determines that transfer and consolidation is justified under § 3.01, it shall order that it take place in the most appropriate district or districts as provided in § 3.04. In an appropriate case, transfer and consolidation may be ordered only for pretrial purposes or, as provided in § 3.01(d), only with regard to certain issues.

(d) Counsel in any case that is the subject of a transfer and consolidation motion before the Complex Litigation Panel, or that already has been transferred and consolidated, are under an obligation to notify the other parties and the court of any case involving an issue of fact or law common to their case. A lawsuit not identified or commenced at the time of the Complex Litigation Panel's original decision may be joined with those that have been transferred and consolidated pursuant to a tag-along procedure comparable to the one already provided for under 28 U.S.C. § 1407.

§ 3.06. Powers of the Transferee Court

(a) Unless the Complex Litigation Panel otherwise provides, transfer and consolidation shall be for all purposes, and the transferee judge shall have the full power to manage and

organize the consolidated proceeding so as to promote its just, efficient and fair resolution. Among the things that the transferee court may consider are the organization of the parties into groups with like interests and the structuring of the litigation by separating the issues into those common questions that should be treated on a consolidated basis and those individual questions that should not. The transferee court also may certify classes either encompassing the entire litigation or for particular issues. Discovery and trial preparation on those issues not consolidated by the transferee court may be stayed until the close of the consolidated proceeding.

(b) The transferee court shall prepare a preliminary plan for the disposition of the litigation. The plan shall specify whether the entire action or only specified issues shall be determined in the transferee district and also shall provide for the disposition of the issues not to be determined in the transferee court. This plan is conditional and may be altered or amended should it be appropriate to do so.

(c) When the transferee court severs issues, it shall have broad discretion to order the separated issues to be retransferred for consolidated treatment in one or more retransferee districts; to return individual issues to the districts in which they originated; to retain those issues for trial; or to order any other appropriate resolution. The transferee court may order the immediate retransfer of those issues not to be determined by it, or it may postpone retransfer until a later stage of the proceedings. When damage issues are severed, the discretion of the transferee court includes the retransfer of the damage issue prior to the trial of liability for consolidated trial in one or more retransferee districts, and the retransfer of the damage issue for consolidated trial in one or more districts after the determination of liability.

§ 3.07. Review

(a) Decisions regarding transfer and consolidation by the Complex Litigation Panel, whether made by a subpanel or the

full Panel, as provided in § 3.05(b), will not be subject to review by any court.

(b) Review of the transferee court's plan under § 3.06(b) concerning whether to transfer subsequent stages of the proceedings will be within the exclusive jurisdiction of the Complex Litigation Panel. Any party may petition the Panel to review that determination but the Panel shall have no obligation to do so. If review is undertaken,

(1) it may be by a subpanel or by the full Panel and

(2) the Panel shall have discretion to affirm the transferee court's decision or to reverse it and specify how and in what district or districts the subsequent stages of the litigation will proceed. The Panel shall have discretion to order any disposition on the retransfer question it believes serves the objectives of justice, efficiency, and fairness.

(c) When the question of liability has been separately adjudicated and finally determined in the transferee court as to all the claims and parties, review may be sought immediately. The appellate court may grant review if it determines that doing so is likely (i) to avoid harm to the party seeking review and (ii) to promote the efficient and economical resolution of the litigation. When a final determination of liability has been made as to less than all the claims or parties, the district judge may certify that determination for review if it concludes that there is no just reason for delay.

(d) Other than as provided in subsection (b) or as otherwise provided by law, all appeals in proceedings transferred and consolidated under § 3.01 should be heard in the court of appeals of the circuit in which the transferee court initially designated by the Complex Litigation Panel is located.

§ 3.08 Personal Jurisdiction in the Transferee Court

Once actions have been transferred and consolidated by the Complex Litigation Panel, the transferee court may exercise jurisdiction over any parties to those actions or any parties later joined to the consolidated proceeding to the full extent of the power permitted a federal court by the United States Constitution.

Draft Complex Litigation Statute
for Federal Intrasystem Consolidation

....

Sec. 3. Transfer and consolidation of complex litigation.

(a) Section 1407 shall be repealed and the following section substituted:

“§ 1407. Complex Litigation: Initial Transfer and Consolidation

“(a) A Complex Litigation Panel of federal judges shall be established and have responsibility for deciding whether and where separate actions shall be transferred and consolidated under subsection (b) of this section. The Panel shall consist of nine circuit and district judges designated from time to time by the Chief Justice of the United States, no two of whom are judges of courts in the same circuit. Motions under this section shall be determined by three-member subpanels, unless a subpanel or any of its members refers a matter to the full Panel for its consideration. Any party may petition the full Panel to rehear a subpanel order granting transfer and consolidation. The decision of a subpanel shall be considered the decision of the Panel. The concurrence of a majority of the subpanel or Panel shall be necessary for any action by the subpanel or Panel.

“(b) When civil actions pending in more than one district involve one or more common questions of fact or law, they may be transferred by the Complex Litigation Panel to any district for consolidated pretrial proceedings or trial, or both. Transfers shall be made upon the determination that transfer and consolidation in the designated transferee court will promote the fair, just, and efficient conduct of the actions. Factors to be considered in deciding whether to order transfer and consolidation include (1) the extent to which transfer and consolidation will reduce duplicative litigation, the relative costs of individual and consolidated litigation, the likelihood of inconsistent adjudications, and the comparative burdens on the judiciary, and (2) whether transfer and consolidation can be accomplished in a way that is fair and does not result in undue inconvenience to the parties and witnesses. In special circumstances, one or more common issues, rather than entire cases,

may be transferred and consolidated. More than one district court may be designated as transferee courts for related cases.”

....

“(d) When actions are transferred and consolidated in a district under subsection (b) of this section, they shall be conducted by a judge or judges to whom the actions are assigned. For this purpose, upon request of the Panel, a circuit judge or a district judge may be designated and assigned temporarily for service in the transferee district by the Chief Justice of the United States or the chief judge of the circuit, as may be required, in accordance with the provision of chapter 13 of this title. After consultation between the Panel and the chief judge of the transferee district court, the chief judge of the district should assign the actions to a judge or judges of that district. The judge or judges to whom actions are assigned and the other circuit and district judges designated when needed by the Panel may exercise the powers of a district judge in any district for the purpose of conducting the proceedings.

“(e) Proceedings for the transfer of an action under this section may be initiated by—

- (i) the Complex Litigation Panel upon its own initiative;
- (ii) the suggestion of the court in which any action is pending; or
- (iii) a motion filed with the Panel by a party in any action.

A copy of the motion shall be filed in the district court in which the moving party’s action is pending.

The Panel shall give notice to the parties in all actions that it considers for transfer or consolidation under this section. The notice shall specify the time and place of the hearing at which the Panel will consider transfer and consolidation. The Panel shall file its order setting a hearing, and any other orders it issues prior to directing or denying transfer and consolidation, in the office of the clerk of the Panel. The Panel’s order of transfer and consolidation shall include a statement of the reasons for its decision. At the hearing, parties may attempt to show cause why their actions or claims should not be transferred and consolidated. The Panel shall file its orders of transfer and consolidation and such other orders it subsequently may make in the office of the clerk of the district court of the transferee district or districts and the orders shall be

effective when filed. The clerk of the transferee district court shall forthwith transmit a certified copy of the Panel's transfer and consolidation order to the clerk of the district court from which the action is being transferred. An order denying transfer shall be filed in each district in which there is a case pending for which the order under this section was made.

“(f) In order to avoid the unnecessary delay of the proceedings affected by a request for transfer and consolidation or of the decision whether to transfer and consolidate,

(i) the transferor court need not stay its proceedings until the transfer and consolidation decision has been made; and

(ii) the Panel need not either postpone its transfer and consolidation decision pending the resolution of motions in transferor courts or stay any of the proceedings in the transferor courts until the transfer and consolidation decision has been made.

“(g) No order of the Panel may be reviewed except by extraordinary writ pursuant to the provisions of Section 1651. Petitions for an extraordinary writ to review an order of the Panel to set a transfer hearing and other orders of the Panel issued prior to the order either directing or denying transfer shall be filed only in the court of appeals having jurisdiction over the district in which a hearing is to be or has been held. Petitions for an extraordinary writ to review an order to transfer or orders subsequent to transfer shall be filed only in the court of appeals of the circuit in which the transferee court is located. There shall be no review by appeal or otherwise of an order of the Panel denying a motion to transfer for consolidated proceedings.

“(h) The Complex Litigation Panel may prescribe rules for the conduct of its business not inconsistent with Acts of Congress and the Federal Rules of Civil Procedure.”

(b) Section 451 should be amended to read as follows:

“§ 451. Definitions

“The term ‘court of the United States’ includes the Supreme Court of the United States, courts of appeals, district courts constituted by chapter 5 of this title, including the Court of International Trade and any court created by Act of Congress the judges

of which are entitled to hold office during good behavior, and the Complex Litigation Panel created by 28 U.S.C. § 1407(a).”

Sec. 4. Powers of the transferee court in complex litigation.

(a) A new Section 1407A should be added, which should read as follows:

“§ 1407A. Complex Litigation: The Transferee Court

“(a) If cases are transferred pursuant to Section 1407, the transferee court shall have the power to organize and manage the consolidated proceeding. Among the matters that the transferee court may consider are the organization of the parties into groups with like interests, the separation of issues into common questions that require treatment on a consolidated basis and individual questions that do not, the certification of classes encompassing either the litigation as a whole or particular issues, and the staying of discovery and trial preparation on issues that are not consolidated. In deciding how best to manage the litigation, the transferee court shall be guided by the factors enumerated in Section 1407(b).

“(b) If the transferee court severs issues or claims for separate treatment under subsection (a) of this section, it shall have discretion to order the separated issues or claims retransferred for consolidated treatment in one or more retransferee districts; to remand individual issues or claims to the districts in which they originated; to retain those issues or claims for trial; or to order any other appropriate resolution. When deciding to retransfer or remand some issues or claims, the transferee court may order immediate retransfer or it may postpone retransfer until a later stage of the proceedings.

“(c) In actions consolidated under Section 1407, the transferee court shall determine the source or sources of the applicable substantive law. Whenever State law supplies the rule of decision, the transferee court may make its own determination as to which State’s rules of decision shall apply to some or all of the actions, parties, or issues.

“(d) As soon as practicable after transfer and consolidation have been effected, the transferee court shall prepare a preliminary plan and order for the management and disposition of the litigation.

tion, specifying whether the transferee court will determine the entire action or only specified issues and providing for the disposition of the issues that it will not determine. The transferee court may alter or amend the plan if, in its discretion, it finds it appropriate to do so.

“(e) The transferee court’s decision regarding retransfer under subsections (b) and (d) of this section shall be reviewed only by the Complex Litigation Panel. Any party to the decision may petition the Panel within 20 days for discretionary review. If review is undertaken, it may be by a subpanel or by the full Panel, and the Panel shall have discretion to order any disposition on the retransfer question it believes serves the objectives of justice, efficiency, and fairness, including affirming, reversing, or modifying the transferee court’s decision and specifying how and in which district or districts subsequent stages of the litigation will proceed.”

(b) Section 1292 shall be amended to add a new subsection (e), which should read as follows:

“(e) In actions consolidated pursuant to Section 1407, if a question of liability has been separately and finally determined by a transferee court as to all the claims and parties, review of that determination may be sought as a final judgment under Section 1291 within 30 days of the trial court’s order. However, if the party held liable is seeking review, then it may be granted only if the appellate court determines that doing so is likely to promote the efficient and economical resolution of the litigation. If a final determination of liability has been made as to less than all the claims and parties, review may be granted only if the transferee court has certified that determination for review upon finding that there is no just reason for delay and the appellate court determines that granting review is likely to promote the efficient and economical resolution of the litigation.”

(c) Section 1294 should be amended to insert an “(a)” before the first sentence and then to add a new subsection (b), which should read as follows:

“(b) All appeals in proceedings transferred and consolidated pursuant to Section 1407, except in actions transferred for pretrial purposes only or as otherwise provided by law, shall be heard in the court of appeals of the circuit in which the transferee court

designated by the Complex Litigation Panel under Section 1407 is located.”

(c) A new Section 2370 should be added, which should read as follows:

“§ 2370. Complex Litigation

“In any actions consolidated pursuant to Section 1407 or Section 1407A, the transferee court may exercise jurisdiction over any parties to those actions or any parties later joined to the consolidated proceeding to the full extent of the power conferrable on a federal court under the United States Constitution.”

(d) A new Section 1785 should be added, which should read as follows:

“§ 1785. Subpoenas in Complex Litigation

“In any actions consolidated under Section 1407 or Section 1407A, a subpoena for attendance at a hearing or trial, if authorized by the transferee court upon motion for good cause shown and upon such terms and conditions as the court may impose, may be served at any place within the jurisdiction of the United States, or anywhere outside the United States if not otherwise prohibited by law.”

Federal-State Intersystem Consolidation

§ 5.01. Removal Jurisdiction

(a) Except as otherwise provided by Act of Congress, the Complex Litigation Panel may order the removal to federal court and consolidation of one or more civil actions pending in one or more state courts, if the removed actions arise from the same transaction, occurrence, or series of transactions or occurrences as an action already filed in the federal court, and share a common question of law or fact with that action. The Complex Litigation Panel shall evaluate each removal request in accordance with the criteria set forth in § 3.01 to determine whether the removal and consolidation of the cases is warranted and to ensure that removal will not unduly disrupt or

impinge upon state court proceedings or impose an undue burden on the federal courts. In doing so, the Complex Litigation Panel should consider factors such as

- (1) the amount in controversy of the claims to be removed;
- (2) the number and size of the actions involved;
- (3) the number of jurisdictions in which the state cases are lodged;
- (4) any special reasons to avoid inconsistency of result;
- (5) the presence of any special local community interests; and
- (6) the possibility of facilitating informal cooperation or coordination with the state courts in which the cases are lodged.

If the standard is met, the Panel then may order the cases removed, consolidated, and transferred pursuant to § 3.04.

(b) If all of the parties as well as the appropriate state judge object to removal of a particular action, then that action shall not be removed, although the remaining cases may be removed and consolidated.

(c) The Complex Litigation Panel shall have the authority to remove common issues, related claims, or entire actions.

(d) Claims to which any state is a party may not be removed under subsection (a) unless the state itself requests or consents to removal.

(e) Removal under subsection (a) may be initiated upon

- (1) the request of any party to any one of the state actions; or
- (2) the certification of any state judge presiding over one or more of the actions.

§ 5.02. Removal Procedure

(a) A party desiring to remove a civil action pursuant to § 5.01 shall file with the Complex Litigation Panel a notice of removal signed in accordance with Rule 11 and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served by any party in the action, and a list of the names and addresses of known parties to the action and to any related actions.

(b) A state judge may recommend that the Complex Litigation Panel consider removal of a civil action pursuant to § 5.01 by certifying that there is a substantial basis for considering whether the action should be removed. The certification shall contain a short and plain statement of the grounds for removal and a list of the names and addresses of known parties to the action and to any related actions.

(c) A notice of removal under subsection (a) shall be filed: (1) within ninety days from the commencement of an action in the state court, within thirty days from the time the party seeking removal was joined to the action, or within thirty days of the interposition of a claim removable under § 5.01; (2) at any time if a timely removal notice has been filed with the Complex Litigation Panel by any party to a related action and is pending before the Panel; or (3) within thirty days of an order consolidating related actions under § 3.01 or under § 5.01. A certification under subsection (b) may be filed at any time.

(d) A party or judge shall give prompt written notice of a filing under subsection (a) or (b) to all parties to that action and shall file a copy of the removal notice or certification with the clerk of the state court.

(e) After making its decision under § 5.01, the Complex Litigation Panel shall enter an order either refusing to remove the action or removing and transferring all or part of it to a federal court and that order shall be filed with the clerk of the state court. Once an order transferring the case is issued, the state court shall proceed no further unless the case, or any part of it, is remanded to it.

§ 5.03. Ancillary and Pendent Jurisdiction

(a) A transferee district court shall have subject-matter jurisdiction over any claim that

(1) arises from the same transaction, occurrence, or series of related transactions or occurrences as a claim that has been transferred to it pursuant to § 3.01, or

(2) involves indemnification arising from the same transaction, occurrence, or series of related transactions or

occurrences as a claim that has been transferred to it pursuant to § 3.01.

(b) The jurisdiction granted in subsection (a) exists without regard to whether the ancillary or pendent claim involves the addition of a party who is not a party to the jurisdictionally sufficient claims to which it is joined.

(c) The district court in its discretion may decline jurisdiction over any claim brought under subsection (a). In exercising its discretion, the court may consider factors such as:

(1) whether the subsection (a) claim would substantially predominate in terms of proof, the scope of the issues raised, or the comprehensiveness of the remedy;

(2) the degree to which the efficient and fair resolution of all the claims will be facilitated or impaired by the presence of the additional party or claim;

(3) the likelihood of jury confusion and the degree to which potential confusion can be alleviated by any of the claim coordinating procedures of § 3.06; and

(4) the degree to which accepting jurisdiction over any additional claim or party may intrude upon state interests or impose an undue burden on the federal court.

(d) Any claim brought under subsection (a) shall be treated in the same manner as a claim consolidated pursuant to § 3.01, and provisions such as nationwide service of process under § 3.08 and choice of law under § 3.09 shall be applicable.

§ 5.04. Antisuit Injunctions

(a) When actions are transferred and consolidated pursuant to § 3.01 or § 5.01, the transferee court may enjoin related pleadings, or portions thereof, pending in any State or United States court whenever it determines that the continuation of those actions substantially impairs or interferes with the consolidated actions and that an injunction would promote the just and efficient resolution of the actions before it.

(b) Factors to be considered in deciding whether an injunction should issue under subsection (a) include

(1) how far the actions to be enjoined have progressed;

(2) the degree to which the actions to be enjoined share common questions with and are duplicative of the consolidated actions;

(3) the extent to which the actions to be enjoined involve issues or claims of federal law; and

(4) whether parties to the action to be enjoined were permitted to exclude themselves from the consolidated proceeding under § 3.05(a) or § 5.01(b).

§ 5.05. Court-ordered Notice of Intervention and Preclusion

(a) If a transferee court in a complex action consolidated pursuant to § 3.01, at the request of a party or on its own initiative, determines that:

(1) An existing claim or claims of nonparties involve one or more questions of law or fact in common with the actions pending before the transferee court and arise out of the same transaction, or series of transactions or occurrences;

(2) Intervention will advance the efficient, consistent, and final resolution of asserted and unasserted claims; and

(3) Intervention will not impose upon either the nonparties or existing parties undue prejudice, burden, or inconvenience,

it may enter an order informing the nonparties that they may intervene in the action and in any event will be bound by the determinations made to the same extent as a party to that action.

(b) An order under subsection (a) shall provide both the existing parties and the affected nonparties with notice setting forth:

(1) The existence, status, and substance of the claims and issues to be resolved in the transferee court;

(2) The nonparties' right to intervene in the consolidated action and the time period during which intervention must be accomplished;

(3) The fact that, whether or not the nonparties exercise the opportunity to intervene, they may benefit from determinations made and will be precluded from relitigating the

issues identified under subsection (b)(1) and adjudicated in the transferee court proceedings; and

(4) The parties' and nonparties' right to petition the court to show why the standards in subsection (a) have not been satisfied.

(c) Upon receipt of the notice prescribed in subsection (b), any party or nonparty may file with the transferee court within twenty days a petition setting forth reasons why the requirements of subsection (a) are not satisfied. The transferee court shall conduct a hearing at which interested parties and nonparties may participate and upon completion of which the transferee court shall transmit notice of its ruling either granting or refusing an order under subsection (a) to all parties and nonparties notified under subsection (b). That notice shall identify specifically those nonparties who may intervene and who will be bound by the determinations made in the consolidated action.

(d) The transferee court's decision under this section will not be subject to immediate review unless it otherwise qualifies under one of the existing interlocutory appeal statutes.

Draft Complex Litigation Statute for
Federal-State Intersystem Consolidation

Sec. 1. Subject matter jurisdiction

(a) A new Section 1368 should be added, which should read as follows:

“§ 1368. Ancillary and Pendent Jurisdiction in Multiparty Cases

“A district court may assert subject-matter jurisdiction over any claim and all parties to that claim that

(a) arises from the same transaction, occurrence, or series of related transactions or occurrences as a claim that has been transferred to it pursuant to Section 1407 or 1407A of Title 28, or

(b) involves indemnification arising from the same transaction, occurrence, or series of related transactions or occurrences as a claim that has been transferred to it pursuant to Section 1407 or 1407A of Title 28.”

(b) A new Section 1453 should be added, which should read as follows:

“§ 1453. Removal Jurisdiction in Multiparty Cases

“(a) Except as otherwise provided by Act of Congress, upon notice by one or more parties to a state action, or the certification of any state judge presiding over the action, one or more civil actions pending in one or more state courts may be removed to federal court and consolidated by the Complex Litigation Panel established in Section 1407(a), if the removed action arises from the same transaction, occurrence, or series of transactions or occurrences as an action already filed in federal court, and shares a common question of law or fact with that action. When making its determination as to removal, the Complex Litigation Panel shall consider whether the consolidation of the cases is warranted under Section 1407 and shall ensure that removal will not unduly disrupt or impinge upon state court proceedings or impose an undue burden on the federal courts. In doing so, the Complex Litigation Panel should consider factors such as

- (1) the amount in controversy of the claims to be removed;
- (2) the number and size of the actions involved;
- (3) the number of jurisdictions in which the state cases are lodged;
- (4) any special reasons to avoid inconsistency of result;
- (5) the presence of any special local community interests; and
- (6) the possibility of facilitating informal cooperation or coordination with the state courts in which the cases are lodged.

If the standard is met, the Panel then may order the cases removed, consolidated, and transferred pursuant to Section 1407(b). The Panel shall have the authority to remove common issues, related claims, or entire actions in order to accomplish these objectives.

(b) Claims to which any state is a party may not be removed under this section unless the state itself seeks or consents to removal.

(c) A case shall not be removed if all of the parties as well as the appropriate state judge object to removal. Denial of removal of a particular case under this subsection does not defeat removal and consolidation of any other case.

Sec. 2. Personal jurisdiction

Section 2370 should be amended to read as follows:

“(a) The court may exercise jurisdiction over any party to an action transferred and consolidated pursuant to Section 1407 or 1407A or brought into federal court and transferred and consolidated under Section 1453, or to any claims brought into federal court under Section 1368, or over any party later joined to the consolidated proceedings to the full extent of the power conferrable on a federal court under the United States Constitution.

(b) Transferee courts designated under Section 1407 may exercise jurisdiction over parties in actions to be enjoined under Section 1407A(f) to the full extent of the power conferrable on a federal court under the United States Constitution.”

Sec. 3. Governing Law

A new Chapter 134 entitled Choice of Law and containing Section 2120 should be added and read as follows:

“§ 2120. Choice of Law in Multiparty Cases

“The federal court shall determine the source or sources of applicable substantive law governing actions removed under Section 1453 and claims asserted under Section 1368. Whenever State law supplies the rule of decision, the court may make its own determination as to which State’s rule(s) of decision shall apply to some or all of the actions, parties, or issues.”

Sec. 4. Procedure

(a) A new Section 1454 should be added, which should read as follows:

“§ 1454. Removal Procedure in Multiparty Cases

“(a) A party desiring to remove a civil action pursuant to Section 1453 shall file with the Complex Litigation Panel a notice of removal signed in accordance with Rule 11 and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served by any party in the action, and a list of the names and addresses of all known litigants to the action and any related actions. A state judge may recommend that the Panel consider removal of a civil action pursuant to Section 1453 by certifying that there is a substantial basis for considering whether the action should be removed. The certification shall contain a short and plain statement of the grounds for removal and a list of the names and addresses of all known litigants to the action and to any related actions.

(b) A notice of removal under subsection (a) shall be filed: (1) within ninety days of the commencement of an action in the state court, within thirty days from the time the party seeking removal was joined to the action, or within thirty days of the interposition of a claim removable under Section 1453; (2) at any time if a timely removal notice has been filed with the Complex Litigation Panel by any party to a related action and is pending before the Panel; or (3) within thirty days of an order consolidating related actions under Section 1407 or under Section 1453. A certification of the trial judge under subsection (a) may be filed at any time.

(c) A party or judge acting under subsection (a) shall give prompt written notice thereof to all parties to that action and shall file a copy of the removal notice or certification with the clerk of the state court.

(d) After making its decision under Section 1453, the Complex Litigation Panel shall enter an order either refusing to remove the action or removing and transferring all or part of it to a federal court and that order shall be filed with the clerk of the state court. Once an order transferring the case is issued, the state court shall proceed no further unless the case, or any part of it, is remanded to it.”

Sec. 5. Transfer and consolidation of complex litigation

(a) Section 1407A(b) should be amended to read as follows:

“(b) If the transferee court severs issues or claims for separate treatment under subsection (a) of this section, it shall have discretion to order the separated issues or claims retransferred for consolidated treatment in one or more retransferee districts; to remand individual issues or claims to the districts or state courts in which they originated; to retain those issues or claims for trial; or to order any other appropriate resolution. When deciding to retransfer or remand some issues or claims, the transferee court may order immediate retransfer or it may postpone retransfer until a later stage of the proceedings.”

(b) Section 1407A should be amended to add a new subsection (f), which should read as follows:

“(f) In actions transferred and consolidated under Section 1407, the transferee court may enjoin related proceedings, or portions thereof, pending in any State or United States court whenever it determines that the continuation of those actions substantially impairs or interferes with the consolidated actions and that an injunction would promote their just and efficient resolution.”

(c) Section 1407A should be amended to add two new subsections (g) and (h), which should read as follows:

“(g) If a transferee court, at the request of a party or on its own initiative, determines that:

(i) an existing claim or claims of nonparties involve one or more questions of law or fact in common with the actions pending before the transferee court and arise out of the same transaction, occurrence, or series of transactions or occurrences;

(ii) intervention will advance the efficient, consistent, and final resolution of asserted and unasserted claims; and

(iii) intervention will not impose undue prejudice, burden, or inconvenience,

it may enter an order informing the nonparties that they may intervene in the action and in any event will be bound by the determinations made to the same extent as a party to that action. The transferee court’s decision under this subsection will not be subject

to immediate review unless it qualifies for review under an existing interlocutory appeals statute.

(h) The transferee court shall provide both the existing parties and the nonparties that it desires to intervene under subsection (g) with notice setting forth:

(i) the existence, status and substance of the claims and issues to be resolved in the transferee court;

(ii) the nonparties' right to intervene in the consolidated action and the time period during which intervention must be accomplished;

(iii) the fact that, whether or not the nonparties exercise the opportunity to intervene, they may benefit from determinations made and will be precluded from relitigating the issues identified under subsection (h)(i) and adjudicated in the transferee court proceedings; and

(iv) the parties' and the nonparties' right to petition the court to show why the standards of subsection (g) have not been satisfied.

Upon receipt of the notice, any party or nonparty may file with the transferee court within twenty (20) days a petition setting forth reasons why the requirements of subsection (g) are not satisfied. The transferee court shall conduct a hearing at which interested parties and nonparties may participate and, upon completion of which, the court shall transmit notice of its ruling either granting or refusing an order under subsection (g) to all parties and nonparties notified under this subsection. The notice shall identify specifically those nonparties who may intervene and who will be bound by the determinations made in the consolidated action."

Appendix C

H.R. 3406, 101st Cong., 2d Sess. (1990)

Proposed Multiparty, Multiforum Jurisdiction Act of 1990

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SEC. 1. SHORT TITLE

This Act may be cited as the "Multiparty, Multiforum Jurisdiction Act of 1990".

SEC. 2. JURISDICTION OF DISTRICT COURTS

(a) **BASIS OF JURISDICTION.**—Chapter 85 of Title 28, United States Code, is amended by adding at the end the following new section:

“§ 1367.¹⁴⁷¹ Multiparty, multiform jurisdiction

“(a) The district courts shall have original jurisdiction of any civil action involving minimal diversity between adverse parties that arises from a single accident, where at least 25 natural persons have either died or incurred injury in the accident at a discrete location and, in the case of injury, the injury has resulted in damages which exceed \$50,000 per person, exclusive of interest and costs, if—

“(1) a defendant resides in a State and a substantial part of the accident took place in another State or other location, regardless of whether that defendant is also a resident of the State where a substantial part of the accident took place;

“(2) any two defendants reside in different States, regardless of whether any such defendants are also residents of the same State or States; or

“(3) substantial parts of the accident took place in different States.

“(b) For purposes of this section—

“(1) minimal diversity exists between adverse parties if any party is a citizen of a state and any adverse party is a citizen of another State, a citizen or subject of a foreign state, or a foreign state as defined in section 1603(a) of this title;

“(2) a corporation is deemed to be a citizen of any State, and a citizen or subject of any foreign state, in which it is incorporated or has its principal place of business, and is deemed to be a resident of any State in which it is incorporated or licensed to do business or is doing business;

“(3) the term ‘injury’ means—

“(A) physical harm to a natural person; and

147. Section number 1367 in Title 28 has since been used by the new statute on federal courts’ supplemental jurisdiction.

“(B) physical damage to or destruction of tangible property, but only if physical harm described in subparagraph (A) exists;

“(4) the term ‘accident’ means a sudden accident, or a natural event culminating in an accident, that results in death or injury incurred at a discrete location by at least 25 natural persons; and

“(5) the term ‘State’ includes the District of Columbia, the Commonwealth of Puerto Rico, and the territories of the United States.

“(c) In any action in a district court which is or could have been brought, in whole or in part, under this section, any person with a claim arising from the accident described in subsection (a) shall be permitted to intervene as a party plaintiff in the action, even if that person could not have brought an action in a district court as an original matter.

“(d) A district court in which under this section is pending shall promptly notify the judicial panel on multidistrict litigation of the pendency of the action.”.

....

SEC. 3. VENUE

Section 1391 of title 28, United States Code, is amended by adding at the end the following:

“(g) A civil action in which jurisdiction of the district court is based upon section 1367 of this title may be brought in any district in which any defendant resides or in which a substantial part of the action giving rise to the action took place.”.

SEC. 4. MULTIDISTRICT LITIGATION

Section 1407 of title 28, United States Code, is amended by adding at the end the following:

“(i)(1) In actions transferred under this section when jurisdiction is or could have been based, in whole or in part, on section 1367 of this title, the transferee district court may, notwithstanding any other provision of this section, retain actions so transferred for the determination of liability and punitive damages. An action

retained for the determination of liability shall be remanded to the district court from which the action was transferred, or to the State court from which the action was removed, for the determination of damages, other than punitive damages, unless the court finds, for the convenience of parties and witnesses and in the interest of justice, that the action should be retained for the determination of damages.

“(2) Any remand under paragraph (1) shall not be effective until 60 days after the transferee court has issued an order determining liability and has certified its intention to remand some or all of the transferred actions for the determination of damages. An appeal with respect to the liability determination and the choice of law determination of the transferee court may be taken during that 60-day period to the court of appeals with appellate jurisdiction over the transferee court. In the event a party files such an appeal, the remand shall not be effective until the appeal has been finally disposed of. Once the remand has become effective, the liability determination and the choice of law determination shall not be subject to further review by appeal or otherwise.

“(3) An appeal with respect to a determination of punitive damages by the transferee court may be taken, during the 60-day period beginning on the date the order making the determination is issued, to the court of appeals with jurisdiction over the transferee court.

“(4) Any decision under this subsection concerning remand for the determination of damages shall not be reviewable by appeal or otherwise.

“(5) Nothing in this subsection shall restrict the authority of the transferee court to transfer or dismiss an action on the ground of inconvenient forum.”

SEC. 5. REMOVAL OF ACTIONS

Section 1441 of title 28, United States Code, is amended—

(1) in subsection (e) by striking out “(e) The court to which such civil action is removed” and inserting in lieu thereof “(f) The court to which a civil action is removed under this section”; and

(2) by inserting after subsection (d) the following new subsection:

“(e)(1) Notwithstanding the provisions of subsection (b) of this section, a defendant in a civil action in a State court may remove the action to the district court of the United States for the district court and division embracing the place where the action is pending if—

“(A) the action could have been brought in a United States district court under section 1367 of this title, or

“(B) the defendant is a party to an action which is or could have been brought, in whole or in part, under section 1367 in a United States district court arising from the same accident as the action in State court, even if the action to be removed could not have been brought in a district court as an original matter.

The removal of an action under this subsection shall be made in accordance with section 1446 of this title, except that a notice of removal may also be filed before trial of the action in State court within 30 days after the date on which the defendant first becomes a party to an action under section 1367 in a United States district court arising from the same accident, or at a later time with leave of the district court.

“(2) Whenever an action is removed under this subsection and the district court to which it was removed or transferred under section 1407(i) has made a liability determination requiring further proceedings as to damages, the district court shall remand the action to the State court from which it had been removed for the determination of damages, unless the court finds that, for the convenience of parties and witnesses and in the interest of justice, the action should be retained for the determination of damages.

“(3) Any remand under paragraph (2) shall not be effective until 60 days after the district court has issued an order determining liability and has certified its intention to remand the removed action for the determination of damages. An appeal with respect to the liability determination and the choice of law determination of the district court may be taken during that 60-day period to the court of appeals with appellate jurisdiction over the district court. In the event a party files such an appeal, the remand shall not be effective until the appeal has been finally disposed of. Once the remand has become effective, the liability determination and the choice of law determination shall not be subject to further review by appeal or otherwise.

“(4) Any decision under this subsection concerning remand for the determination of damages shall not be reviewable by appeal or otherwise.

“(5) An action removed under this subsection shall be deemed to be an action under section 1367 and an action in which jurisdiction is based on section 1367 of this title for purposes of this section and sections 1367, 1407, 1658, 1697, and 1785 of this title.

“(6) Nothing in this subsection shall restrict the authority of the district court to transfer or dismiss an action on the ground of inconvenient forum;”.

SEC. 6. CHOICE OF LAW.

(a) DETERMINATION BY THE COURT.—Chapter 111 of title 28, United States Code, is amended by adding at the end the following new section:

“§ 1658. Choice of law in multiparty, multiforum actions

“(a) In an action which is or could have been brought, in whole or in part, under section 1367 of this title, the district court in which the action is brought or to which it is removed shall determine the source of the applicable substantive law, except that if an action is transferred to another district court, the transferee court shall determine the source of the applicable substantive law. In making this determination, a district court shall not be bound by the choice of law rules of any State, and the factors that the court may consider in choosing the applicable law include—

“(1) the law that might have governed if the jurisdiction created by section 1367 of this title did not exist;

“(2) the forums in which the claims were or might have been brought;

“(3) the location of the accident on which the action is based and the location of related transactions among the parties;

“(4) the place where the parties reside or do business;

“(5) the desirability of applying uniform law to some or all aspects of the action;

“(6) whether a change in applicable law in connection with removal or transfer of the action would cause unfairness;

“(7) the danger of creating unnecessary incentives for forum shopping;

“(8) the interest of any jurisdiction in having its law apply;

“(9) any reasonable expectation of a party or parties that the law of a particular jurisdiction would apply or would not apply; and

“(10) any agreement or stipulation of the parties concerning the applicable law.

“(b) The district court making the determination under subsection (a) shall enter an order designating the single jurisdiction whose substantive law is to be applied in all other actions under section 1367 arising from the same accident as that giving rise to the action in which the determination is made. The substantive law of the designated jurisdiction shall be applied to the parties and claims in all such actions before the court, and to all other elements of each action, except where Federal law applies or the order specifically provides for the application of the law of another jurisdiction with respect to a party, claim or element of an action.

“(c) In an action remanded to another district court or a State court under section 1407(i)(1) or 1441(e)(2) of this title, the district court’s choice of law under subsection (b) shall continue to apply.”

....

SEC. 7. SERVICE OF PROCESS

(a) OTHER THAN SUBPOENAS.—(1) Chapter 113 of title 28, United States Code, is amended by adding at the end the following new section:

“§ 1697. Service in multiparty, multiform actions

“When the jurisdiction of the district court is based in whole or in part upon section 1367 of this title, process, other than subpoenas, may be served at any place within the United States, or anywhere outside the United States if otherwise permitted by law.”.

....

(b) SERVICE OF SUBPOENAS.—(1) Chapter 117 of title 28, United States Code, is amended by adding at the end the following new section:

“§ 1785. Subpoenas in multiparty, multiform actions

“When the jurisdiction of the district court is based in whole or in part upon section 1367 of this title, a subpoena for attendance at a hearing or trial may, if authorized by the court upon motion for good cause shown, and upon such terms and conditions as the court may impose, be served at any place within the United States, or anywhere outside the United States if otherwise permitted by law.”.

. . . .

Appendix D

American Bar Association
Commission on Mass Torts
Report to the House of Delegates

Recommendations

. . . .

RECOMMENDATION 2. To provide for efficient and economical management and adjudication of mass tort litigation which could not otherwise be effectively achieved before a single state or federal court, Congress should enact legislation to permit in appropriately limited circumstances consolidation before a federal court of individual tort actions arising from a single accident or use of or exposure to the same product or substance. Such legislation should include at least the following provisions:

(a). *Establishment of a Judicial Panel.*

(1). Congress should establish a judicial panel empowered to determine that tort actions constitute “mass tort litigation” whenever at least 250 civil tort claims arising from a single accident or use of or exposure to the same product or substance, each of which involves a claim in excess of \$50,000 for wrongful death, personal injury or physical

damage to or destruction of tangible property, are pending in different federal district courts or in one federal district court and one or more state courts.

(2). The panel should be empowered to determine whether some or all individual actions arising in mass tort litigation should be consolidated before a federal court. In making this determination, the panel should consider all relevant circumstances including:

(a). the number and value of all currently asserted claims;

(b). the number of different state or federal courts in which individual tort actions are pending;

(c). the extent to which issues common to some or all such actions or parties predominate over individual issues;

(d). the likelihood that additional cases stemming from the same accident or involving the same product or substance will be filed;

(e). the resolution, if any, of other actions arising from the same events;

(f). the stage of individual cases pending in state or federal courts;

(g). whether the claims involve an ongoing course of conduct;

(h). the desires of the parties;

(i). the extent and thoroughness by which the facts have been or can now be developed through discovery or other means;

(j). the interests of state and federal judicial systems in avoiding unnecessarily duplicative litigation;

(k). the parties' interest in controlling their own litigation; and

(l). the availability of a single state forum before which all the cases can be consolidated.

(b). *Authority of the District Court.* Congress should vest the district court before which such mass tort cases have been consolidated with broad authority to:

(1). organize and manage the litigation;

(2). retain some or all of the actions transferred to it, or some claims, defenses or issues asserted in or some parties

to such actions, either for all purposes or for determination of one or more issues of law or fact; or

(3). retransfer or remand some or all actions, or specified claims, defenses or issues asserted in or particular parties to such actions, to the district court(s) from which they were transferred, to the State court(s) from which they were removed, or, with the approval of the panel, to one or more other district courts.

RECOMMENDATION 3. Congress should enact, pursuant to its power to regulate interstate commerce, legislation to permit individual actions arising in litigation declared to be "mass tort litigation" by a federal judicial panel to be filed in or removed to a federal court without regard to the citizenship of the parties. Such legislation should provide that upon entry by the panel of an order consolidating particularly described tort actions before a federal court:

- (a). all such pending actions and all such other tort claims as the panel may specify shall thereafter be deemed to arise under the laws of the United States;
- (b). the district courts of the United States shall thereafter have original jurisdiction of all such suits; and
- (c). any party to such an action filed in or pending before a state court may remove the action to the district court to which the panel has transferred the cases for coordinated or consolidated proceedings.

RECOMMENDATION 4. When state law provides the rule of decision, such legislation should mandate a federal court presiding over consolidated mass tort litigation to select applicable state(s) law(s) by choice of law standards developed by the federal courts in light of reason and experience.

RECOMMENDATION 5. Congress should enact legislation providing that whenever punitive damage claims are asserted in mass tort litigation:

- (a). all such claims against the same defendant arising from the same or substantially similar conduct should be consolidated before one court;
- (b). only a single punitive damages judgment should be entered against the defendant upon a determination of such liability and the amount of such damages; and

(c). in the event such a judgment is entered, the court may apportion equitably that award among those plaintiffs entitled to share in it and may allocate a portion of that award to a public purpose.

Draft Federal Mass Tort Jurisdiction Reform Act

Sec. 101. Short title.

This Act may be cited as the Federal Mass Tort Jurisdiction Reform Act.

Sec. 102. Congressional Findings and Declaration of Purpose.

(a). The Congress finds—

(1) that separate adjudication of individual tort actions arising from a single accident or use of or exposure to the same product or substance is inefficient and expensive, imposes serious burdens on the state and federal judicial systems, and poses unacceptably high risks of inconsistent results;

(2) that the inability of the parties to achieve consolidation before a single court of related tort actions pending in different federal or state courts imposes unnecessary and unreasonable burdens on commerce and has sometimes been a substantial factor prompting defendants engaged in commerce to seek protection from the federal bankruptcy courts; and

(3) the imposition of multiple punitive damage awards against the same defendant for the same conduct is unnecessary to attain the legitimate purposes of such awards, and constitutes a burden on commerce.

(b). The purposes of this subchapter are—

(1) to provide a fair, economical and efficient method for consolidated resolution of mass tort claims arising from a single accident or use of or exposure to the same product or substance;

(2) to facilitate the prompt and fair resolution of common questions of law or fact arising in mass tort litigation;

(3) to reserve to the States the development of the law of torts to the maximum extent feasible consistent with the purposes of this act; and

(4) to provide for a single determination of punitive damage claims in mass tort litigation against the same defendant for the same or substantially similar conduct, and to protect such defendants from multiple, successive awards for such damages.

Sec. 103. The Judicial Panel for Mass Tort Litigation.

(a). The Judicial Panel for Mass Tort Litigation shall consist of seven circuit and district judges designated from time to time by the Chief Justice of the United States, no two of whom shall be from the same circuit. The concurrence of four members shall be necessary to any action by the panel.

(b). The panel may prescribe rules for the conduct of its business not inconsistent with Acts of Congress or the Rules of Civil Procedure.

(c). Whenever at least 250 civil tort claims arising from a single accident or use of or exposure to the same product or substance, each of which involves a claim in excess of \$50,000 for wrongful death, personal injury or physical damage to or destruction of tangible property, are pending in different federal courts or in one federal district court and one or more state courts, the panel may declare the cases to constitute "mass tort litigation" and upon such a determination it may transfer some or all such actions pending in different districts to any district for coordinated or consolidated proceedings. An order entered pursuant to the provisions of this subsection shall describe with particularity the actions being transferred.

(d). In making the decisions as to whether the individual claims constitute "mass tort litigation," and whether some or all such actions should be transferred for coordinated or consolidated proceedings before a district court, the panel shall consider: (1) the number and value of all currently asserted claims; (2) the number of different state or federal courts in which individual tort actions are pending; (3) the extent to which issues common to some or all such actions or parties predominate over individual issues; (4) the likelihood that additional cases stemming from the same

accident or involving the same product or substance will be filed; (5) the resolution, if any, of other actions arising from the same events; (6) the stage of individual cases pending in state or federal courts; (7) whether the claims involve an ongoing course of conduct; (8) the desires of the parties; (9) the extent and thoroughness by which the facts have been or can now be developed through discovery or other means; (10) the interests of state and federal judicial systems in avoiding unnecessarily duplicative litigation; (11) the parties' interest in controlling their own litigation; (12) the availability of a single state forum before which all cases can be consolidated; (13) the purposes of this act.

(e). Proceedings under this action may be initiated by the panel on its own motion or on the suggestion of any court in which a tort action is pending or by motion by any party to a tort action alleged to constitute "mass tort litigation." The panel shall give notice to the parties in all actions alleged to constitute "mass tort litigation," and such notice shall specify the time and place of any hearing to determine whether such a declaration should be made. Orders of the panel to set a hearing and other orders of the panel issued prior to an order directing or denying transfer shall be filed in the office of the clerk of the district court in which a transfer hearing is to be or has been held. The panel's declaration and any order of transfer or consolidation shall be based upon a record of such hearing at which evidence may be offered by any party to an action that would be affected by the proceedings under this section, and shall be supported by findings of fact and conclusions of law based upon such record. Such orders as the panel may make thereafter shall be filed in the office of the clerk of the district court of the transferee district and shall be effective when thus filed. The clerk of the transferee district court shall forthwith transmit a certified copy of the panel's order to transfer to the clerk of each district court from which an action is being transferred. An order denying transfer shall be filed in each district wherein there is a case pending in which the motion for transfer has been made.

(f). No proceedings for review of any order of the panel may be permitted except by extraordinary writ pursuant to the provisions of title 28, section 1651, United States Code. Petitions for an extraordinary writ to review an order of the panel to set a hearing and other orders issued prior to an order directing or denying

transfer shall be filed only in the court of appeals having jurisdiction over the district in which a hearing is to be or has been held. Petitions for an extraordinary writ to review an order to transfer or orders subsequent to transfer shall be filed only in the court of appeals having jurisdiction over the transferee district. There shall be no appeal or review of an order of the panel denying a motion to transfer for consolidated or coordinated proceedings.

Sec. 104. Jurisdiction and Removal.

Upon entry by the panel of an order transferring particularly described tort actions to a district court for coordinated or consolidated proceedings, all such pending actions and all such other tort actions shall be deemed to arise under the laws of the United States, and the district courts of the United States shall thereafter have original jurisdiction of all such suits; and any party to such an action filed in or pending before a state court may remove the action to the district court to which panel has transferred the cases for coordinated or consolidated proceedings.

Sec. 105. The Transferee District Court.

(a). The district court to which mass tort cases have been transferred shall have full power to organize and manage the consolidated proceeding. Among the procedures that the transferee court may consider are the organization of the parties into groups with like interests; the separation of issues into those common questions that should be treated on a consolidated basis and those individual questions that should not; the certification of classes encompassing either the litigation as a whole or particular issues; and the staying of discovery and the consolidated proceeding. In deciding how best to organize and manage the litigation, the transferee court shall be guided by the factors enumerated in Section 103(d).

(b). The transferee court may:

(1) retain some or all of the actions transferred to it, or some claims, defenses or issues asserted in or some parties to such actions, either for all purposes or for determination of one or more issues of law or fact; or

(2) remand some or all actions, or specified claims, defenses or issues asserted in or particular parties to such actions, to the district court(s) from which they were transferred, to the State court(s) from which they were removed, or, with the approval of the panel, to one or more other district courts. In making the decision to retain or remand some or all such actions, issues or parties, the district court shall be guided by the purposes of this act and the considerations set forth in Section 103(d).

Section 106. Choice of Law.

In consolidated mass tort litigation instituted, transferred, removed or maintained under this act, the district court shall determine the source or sources of applicable substantive law. Whenever State law supplies the rule of decision, the court may make its own determination in light of reason and experience as to which State(s) rule(s) shall apply to some or all of the actions, parties or issues.

Section 107. Service of Process.

When the jurisdiction of the district court is based in whole or in part upon this subchapter,

(a). process, other than subpoenas, may be served at any place throughout the jurisdiction of the United States, or anywhere outside the United States when otherwise permitted by law, and

(b). a subpoena for attendance at a hearing or trial may, if authorized by the court upon motion for good cause shown, and upon such terms and conditions as the court may impose, be served at any place within the jurisdiction of the United States, or anywhere outside the United States if otherwise permitted by law.

Appendix E

Uniform Transfer of Litigation Act May, 1991 Draft¹⁴⁸**Part I: Transfer**

SECTION 101. POWER TO TRANSFER. A [designate] court of this State may transfer an action or any part of an action to a court not of this State pursuant to Sections 102 to 110.

SECTION 102. TRANSFER BY COURT HAVING JURISDICTION. A [designate] court of this State that has jurisdiction of the subject matter of an action and the parties may transfer all or any part of the action to a court not of this State that consents to the transfer and has jurisdiction of the matters transferred.

SECTION 103. TRANSFER BY COURT LACKING JURISDICTION. A [designate] court of this State that lacks jurisdiction of the subject matter of an action or part of an action or that lacks jurisdiction of a party may transfer all or any part of the action to a court not of this State that consents to the transfer and has jurisdiction of the matters and parties transferred.

SECTION 104. REASONS FOR TRANSFER. A transfer may be ordered to serve the fair, effective, and efficient administration of justice and the convenience of the parties and witnesses. The court shall consider all relevant factors, including the interest of each plaintiff in selecting a forum and the public interest in securing a single litigation and disposition of related matters.

SECTION 105. TRANSFER ORDER. A transfer may be ordered on motion of a party or the court's own motion after notice and opportunity to be heard. A transfer order must state the reasons for transfer and may specify terms of transfer. The court shall give notice of the transfer order to the parties. A party or the court may file the transfer order in the receiving court.

SECTION 106. WHEN TRANSFER EFFECTIVE. A transfer takes effect when an order accepting transfer is filed in the transferring court.

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....

SECTION 109. RETURN. The transferring court shall accept the return of any matter ordered returned by the receiving court pursuant to the terms of the transfer order or for lack of jurisdiction in the receiving court.

SECTION 110. APPELLATE REVIEW. An order granting or refusing transfer is reviewable only by extraordinary writ [or permissive interlocutory appeal]. Rulings not reviewed before a transfer takes effect are not reviewable in this State except as to matters returned or transferred back.

Part II: Receipt

SECTION 201. RECEIPT. A court of this State may accept transfer of an action or any part of an action pursuant to Sections 202 to 219.

SECTION 202. RECEIPT BY COURT HAVING JURISDICTION. A court that has jurisdiction of the subject matter and parties may accept a transfer whether or not the transferring court had jurisdiction of the subject matter or parties.

SECTION 203. RECEIPT BY COURT LACKING PERSONAL JURISDICTION. A receiving court that has jurisdiction of the subject matter may assert jurisdiction over a party that is subject to the jurisdiction of the transferring court.

SECTION 204. RECEIPT REFUSED. A receiving court may refuse to accept transfer for any reason, but shall state the reasons for the refusal.

SECTION 205. RECEIPT ORDER. A party may move for an order accepting or refusing a transfer. The receiving court shall enter an order accepting a transfer unless within 30 days after the motion was made the court enters an order refusing the transfer or directing further proceedings to determine whether to accept the transfer.

SECTION 206. NOTICE OF RECEIPT. The receiving court shall give all parties notice of the order accepting or refusing transfer. A party or the court may file the order in the transferring court. The transfer takes effect when an order accepting transfer is filed in the transferring court.

....

SECTION 208. TERMS OF TRANSFER. The receiving court for good cause may depart from the terms specified in the transfer order.

SECTION 209. STATUTE OF LIMITATIONS. If the transferring court had jurisdiction of the subject matter and parties, the receiving court may not dismiss because of a state of limitations a claim that would not be dismissed on that ground by the transferring court.

....

SECTION 215. RETURN FOR LACK OF JURISDICTION. If the receiving court determines after accepting transfer that it lacks jurisdiction of a part of the matters transferred by a court that had jurisdiction, it may return that matter and any additional matters to the transferring court.

SECTION 216. RETURN PURSUANT TO TRANSFER ORDER. The receiving court may return any transferred matter to the transferring court pursuant to the terms of the transfer order.

....

SECTION 219. APPEALS. An order granting transfer is not reviewable in the receiving State by appeal or otherwise. An order accepting or refusing to accept transfer, or granting or refusing to grant return, is reviewable in the receiving State only by extraordinary writ [or permissive interlocutory appeal] at the time the order is entered. Review may be had in the receiving State of all other rulings made by the receiving court and of all rulings made by the transferring court not reviewed before the transfer took effect.